

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 908

WILLIE CARTER, SR., JOHN HEAD,
REV. PERCY McSHAN,
APPELLANTS,

—v.—

JURY COMMISSION OF GREENE COUNTY,
ALABAMA, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

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THREE-JUDGE PROCEEDING ON APPEAL

WESTERN DIVISION

Docket CA66 562

PAUL M. BOKULICH, WILLIE CARTER, SR., JOHN HEAD, REV. PERCY McSHAN, on their own behalf and on behalf of all others similarly situated,

GEORGE GREENE and HUBERT G. BROWN,

Plaintiffs-Intervenors,

—vs.—

JURY COMMISSION OF GREENE COUNTY, ALABAMA, WALTER MORROW, ALBERT GRAY, and MELVIN DURRETTE, as members of the Jury Commission of Greene County, Alabama, Mary C. YARBROUGH, as Clerk of the Jury Commission of Greene County, Alabama, E. F. HILDRETH, as Circuit Judge for the 17th Judicial District of Alabama, T. H. BOGGS, as District Attorney for Greene County, Alabama, RALPH BANKS, JR., as County Attorney for Greene County, Alabama, and GEORGE C. WALLACE, as Governor of the State of Alabama.

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THOMAS H. BOGGS*Dist. Atty., 17th Judicial Circuit
of Alabama*

Linden, Ala. 36748

Relevant Docket Entries**RALPH BANKS, JR.***County Atty., Greene County, Ala.***Eutaw, Ala. 35462****MACDONALD GALLISON***Attorney General***Montgomery, Ala.****DATE****FILINGS—PROCEEDINGS**

- 9- 9-66 Complaint filed —Page 1—
- 9-13-66 Order denying plaintiffs request for an Order to Show cause, filed and entered (Grooms) —Page 14—
- 9-13-66 Notice of plaintiffs of Appeal and designation of record, filed—copies served on defendants pro se —Page 15—
- 9-16-66 Certified copy of order of U.S. Court of Appeals, Fifth Circuit, enjoining and restraining defendants-appellees from presenting the action pending against plaintiff, Paul M. Bokulich, in the Circuit Court for the 17th Judicial District, Greene Co., Ala., before a Grand Jury, pending consideration by the next regularly constituted panel of this Court of the application for emergency relief, and which is assigned for hearing at Atlanta, Ga., on September 20, 1966 at 2:30 P.M., filed —Page 17—
- 9-22-66 Amended complaint filed—copies served by counsel —Page 18—
- 9-22-66 Order enjoining and restraining the defendants herein from presenting the action pending against plaintiff, Paul M. Bokulich in the Cir-

Relevant Docket Entries

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cuit Court of Greene County before a grand jury, it appearing to the Court that irreparable injury and damages will result to plaintiff if this order and stay is denied plaintiff, and it further appearing by an amendment herein that this action should properly be heard by a district court of 3 judges, and that defendants are enjoined and restrained from presenting the action pending against plaintiff pending the convening of such a court and the further order of said 3-judge district court, filed and entered (Grooms) — copies served by counsel —Page 29—

9-28-66 Certified copy of Order of U.S. Court of Appeals, Fifth Circuit, vacating Order entered by Judge John Minor Wisdom on September 15, 1966, and dismissing the appeal, the U.S. Court of Appeals having no jurisdiction of the appeal, filed —Page 30—

9-29-66 Order of Hon. Elbert P. Tuttle, Chief Judge, Fifth Circuit, designating the Honorable John C. Godbold, United States Circuit Judge, Honorable Clarence W. Allgood and Honorable H. H. Grooms, United States District Judges for the Northern District of Alabama, as members of, and to constitute the three-judge Court to hear and determine this action, filed and entered —Page 31—

10- 5-66 Motion of defendants, separately and severally, to dismiss the complaint and the motion for preliminary injunction in this cause, filed—copy served by counsel —Page 32—

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DATE	FILINGS—PROCEEDINGS
12-2-66	Deposition of Albert Gray taken at instance of plaintiff, filed—
3-22-67	Motion of George Greene and Hubert G. Brown for leave to intervene as plaintiffs-intervenors in this action, and ORDER of Hon. H. H. Grooms granting, subject to objection thereto, if any, filed—copy served by counsel —Page 36—
3-22-67	Complaint in intervention on behalf of George Greene and Hubert G. Brown, filed — copies served by counsel —Page 38—
3-22-67	Affidavit of Hubert G. Brown, filed — copies served by counsel —Page 43—
3-22-67	Motion of George Greene and Hubert G. Brown, plaintiffs-Intervenors, for temporary restraining order, filed—copies served by counsel —Page 45—
3-22-67	Order enjoining and restraining defendants herein from prosecuting any action against plaintiffs-intervenors, George Greene and Hubert G. Brown, on charges of grand larceny presently pending in Greene County, Alabama, pending the hearing and determination of the motion for leave to intervene herein by the statutory three-judge district court convened in this action, filed and entered (Grooms)—copies mailed attorneys for defendants —Page 48—
3-22-67	Certificate of notification of application for temporary restraining order, filed —Page 50—
4-13-67	Answer of defendants to the amended complaint, filed—copy served by counsel —Page 51—

Relevant Docket Entries

- | DATE | FILINGS—PROCEEDINGS |
|---------|---|
| 4-21-67 | Notice that this action has been reset for Trial on Tuesday, June 6, 1967, at 10:00 a.m., in Courtroom No. 3 of the United States District Court, Birmingham, Ala., before Hon. John C. Godbold, United States Circuit Judge, and Hon. H. H. Grooms, and Hon. Clarence W. Allgood, United States District Judges, issued —Page 54— |
| 5-19-67 | Memorandum Brief of defendants, filed—copy served by counsel —Page 55— |
| 5-22-67 | Memorandum of Law of plaintiffs' filed—copy served by counsel —Page 61— |
| 6-5-67 | Motion of defendant, George C. Wallace, to quash subpoenas heretofore issued for him to appear, testify and bring certain records with him to testify in this proceeding, with Affidavit attached, filed—ORDER of the Court quashing subpoenas —Page 89— |
| 6-6-67 | On trial before the Hon. John C. Godbold, United States Circuit Judge, Hon. H.H. Grooms and Hon. Clarence W. Allgood, United States District Judges, sitting as a three-judge panel to try this cause, at Birmingham, Alabama—ORDER, in Open Court, substituting Lurleen Wallace, as Governor of the State of Alabama, in lieu of George C. Wallace—instanter subpoena issued for George C. Wallace, on behalf of plaintiffs—introduction of plaintiffs' testimony—daily adjournment— |
| 6-7-67 | Motion of George C. Wallace to quash instanter subpoena issued on June 6, 1967 commanding |

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him to appear and testify on behalf of plaintiffs,
filed —Page 95—

- 7-14-67 Order, dated July 12, 1967, directing the Clerk of this Court to deliver the original Jury Roll of Greene County, Alabama, to the United States Marshal for delivery to the Clerk of the Jury Commission of Greene County at Eutaw, Alabama, it appearing that said Jury Roll was received in evidence as an Exhibit with consent to substitute a copy therefor, and it further appearing that such substitution has been made, filed and entered (Grooms) —Page 100—
- 7-24-67 List of Negroes on Jury Roll No. 50 of Greene County filed pursuant to order of court —Page 110—
- 8- 2-67 Deposition on written interrogatories of Dr. John S. deCani taken at instance of plaintiff filed (plaintiff allowed to take this deposition at trial)—
- 8- 3-67 Notice to attorneys of record that plaintiff has filed deposition of Dr. John S. deCani herein filed—copies served by counsel —Page 120—
- 8- 8-67 Transcript of proceedings had at three-judge trial filed by Court Reporter, Meador—
- 8-15-67 Objections of defendants to answers of witness, Dr. John S. deCani, given to written interrogatories, filed —Page 121—

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8-15-67	Notice of filing of objections of defendants to answers of witness, Dr. John S. deCani, given to written interrogatories, filed —Page 123—
8-15-67	Memorandum of plaintiffs of Law in Response to Court's Questions, filed — copies served by counsel —Page 124—
8-17-67	Deposition by Interrogatories propounded on plaintiffs' behalf to Solomon Knight, filed —Page 130—
8-17-67	Summary of Evidence by plaintiff, filed —Page 132—
9-5-67	Memorandum of defendants of facts, filed—copy served by counsel —Page 137—
9-13-67	Response of plaintiffs to defendants' objections to answers given to written interrogatories, filed —copies served by counsel —Page 142—
9-18-67	Order, dated September 15, 1967 overruling defendants' objections to the answers of the witness, Dr. John S. deCani, given to written interrogatories, filed and entered (Grooms) —Page 145—
9-13-68	Opinion of three-judge court (Godbold, Grooms and Allgood) filed and entered—copies mailed attorneys —Page 146—
9-13-68	Order Judgment, pursuant to the opinion filed in this case in lieu of formal findings of fact and conclusions of law under Rule 52, Fed. R. Civ. P., that there is systematic exclusion of Negroes from the jury rolls of Greene County,

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DATE

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Alabama, by reason of purposeful discrimination, in violation of the Fourteenth Amendment to the Constitution of the United States; that Title 30, §21, Code of Alabama (1958), as amended, establishing qualifications for jurors, has been unconstitutionally applied to Negroes of Greene County, Alabama; overruling and denying the motion to dismiss by defendants, and allowing the intervention of George Greene and Hubert G. Brown and overruling and denying the objections thereto; denying the prayer of plaintiffs Paul M. Bokulich and plaintiffs-intervenors George Greene and Hubert G. Brown for injunction forbidding the grand jury of Greene County, Alabama, to consider criminal charges against them; and denying the prayer that prosecutors in the Circuit Court of Greene County, Alabama be enjoined from exercising peremptory challenges against jurors on account of race; and denying the prayer that Tit. 30, §21, Code of Alabama (1958), as amended, and Tit. 20, §4, of said code, be declared unconstitutional on their face; and denying the prayer that the Jury Commission of Greene County, Alabama, be declared constituted in an unconstitutional manner; and *dismissing this action on the merits as to defendants E. F. Hildreth, as Circuit Judge; Lurleen B. Wallace, as Governor; T. H. Boggs, as District Attorney; and Ralph Banks, Jr., as County Attorney; and restraining and enjoining defendants Walter Morrow, Albert Gray and Melvin Durrette, as mem-*

Relevant Docket Entries

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FILINGS—PROCEEDINGS

bers, and Mary C. Yarbrough, as clerk, of the Jury Commission of Greene County, Alabama, and their successors in office, *from systematically excluding Negroes from the jury roll of Greene County, Alabama*, and from applying Tit. 30, §21, Code of Alabama (1958), as amended, to Negroes in a manner other and different from the manner in which applied to whites, and ordering said defendants to take prompt action to compile a jury list for Greene County, Alabama, in accordance with the laws of Alabama and the constitutional principles set out in this judgment and in the opinion of the court entered this date, *and to file with this court within sixty days* a jury list as so compiled, showing thereon the information required by Tit. 30, §20, Code of Alabama (1958), as amended, plus the race of each juror, and if available the age of each juror, and a report setting forth the procedures, system and method by which said list was compiled and by which in the compilation thereof the qualifications for jurors, and the exclusions from jury service, provided by the laws of Alabama were applied to adult citizens of the county, and taxing costs of this action against the defendants Walter Morrow, Albert Gray and Melvin Durette, as members, and Mary C. Yarbrough, as clerk, of the Jury Commission of Greene County, Alabama, filed and entered (Godbold, Grooms, Allgood)—copies mailed attorneys —Page 175—

Relevant Docket Entries

- | DATE | FILINGS—PROCEEDINGS |
|----------|--|
| 10-14-68 | Notice of Appeal by plaintiff Paul M. Kulich and Intervenor-Plaintiffs George Greene and Hubert G. Brown to the United States Supreme Court filed — copies served by counsel —Page 179— |
| 11- 7-68 | Notice of Appeal by plaintiffs Willie Carter, Sr., John Head and Reverend Percy McShan to the Supreme Court of the United States filed—copies served by counsel —Page 181— |
| 11- 7-68 | Bond for costs on appeal (\$250.00) filed —Page 184— |
| 11- 8-68 | Jury Roll No. 52 compiled by the Jury Commission of Greene County in accordance with Order of this Court on September 13, 1968, with Report of the Jury Commission filed— |
| 11-26-68 | Order that the Clerk of this Court transmit the original pleadings and papers, together with original deposition and exhibits constituting the record on appeal in this action to the Clerk of the U.S. Supreme Court for the use of said Court in connection with the appeal, and that the Clerk of the U.S. Supreme Court return the record to the Clerk of this Court when it has served its purpose, filed and entered (Grooms)— |

[18]

Amended Complaint

(Filed September 22, 1966)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA,

WESTERN DIVISION

Civil Action No. 66-562

(Title Omitted in Printing)

AMENDED COMPLAINT*First Claim*

1. This is a civil action brought by Plaintiffs on their own behalf and on behalf of all others similarly situated for a Declaratory Judgment that:

a. qualified Negroes are systematically excluded from the Grand and Petit Juries of Greene County, Alabama by virtue of purposeful discrimination by the Defendants in failing to place the names of all qualified persons on the jury roll and in the jury box solely on account of their race and color,

b. Code of Ala., Tit. 30, Sections 4 and 21 are unconstitutional on their face and as applied to Plaintiffs and those similarly situated, and

c. the segregated, all-white Defendant JURY COMMISSION OF GREENE COUNTY, ALABAMA ("JURY COMMISSION") is unconstitutionally constituted.

[19] and for a Preliminary and Permanent Injunction:

a. enjoining and restraining Defendants from presenting the action pending against Plaintiff BOKULICH in

Amended Complaint

the Circuit Court for the 17th Judicial District, Greene County, Alabama before a Grand and Petit Jury until a non-segregated JURY COMMISSION be appointed and until Negroes are not systematically excluded from the Grand and Petit Juries for Greene County, Alabama,

b. enjoining and restraining Defendants from systematically excluding Negroes from service upon the Grand and Petit Juries for Greene County, Alabama,

c. compelling Defendant JURY COMMISSION and its Defendant members to place all eligible Negro jurors on the jury roll and in the jury box for Greene County, Alabama, and enjoining and restraining Defendants JURY COMMISSION, BOGGS and BANKS from rejecting eligible Negro jurors pursuant to Code of Ala., Tit. 30, Sections 4 and 21 for reasons of race or color, and

d. vacating the appointment of the segregated, all-white Defendant JURY COMMISSION, declaring Defendant JURY COMMISSION vacant, and compelling Defendant WALLACE to select new members without discrimination.

2. The jurisdiction of this Court arises under the Constitution of the United States and, in particular, under the Fourteenth Amendment thereto and under the laws of the United States and, in particular, Title 28 U.S.C. Sections 1331, 1343, 2201, 2202, 2281, 2283, 2284, and Title 42 U.S.C. Sections 1981 *et seq.* The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00.

3. Plaintiffs bring this action on their own behalf and on the behalf of all other persons similarly situated pursu-

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ant to Rule 23 of the Federal Rules of Civil Procedure. The members of this class represented herein are so numerous as to make it impracticable to bring them all before the Court. Plaintiffs fairly insure the adequate representation of all. The character of the right sought to be enforced for the class is several and there are common questions of law and fact affecting the several rights and common relief is sought.

4. a. Plaintiff BOKULICH is a white civil rights worker associated with the Southern Christian Leadership Conference to assist in the obtaining of equal rights for Negro citizens. Plaintiff BOKULICH was arrested on June 20, 1966 and charged with two counts of Grand Larceny. These charges followed a fiercely contested Primary Election on May 3, 1966 wherein two Negroes qualified for, and one was victorious in, the run-off election for Tax Collector and Member of the Board of Education. In addition, a lawsuit was filed in the Court charging fraud, harassment, and intimidation [20] as the cause of the defeats of the Negro candidates. Plaintiff BOKULICH was released upon payment of a bond of \$2,000 which was set during a *Habeas Corpus* proceeding to secure his release. Plaintiff's case is scheduled to be presented to the Grand Jury of Greene County, Alabama on September 19, 1966.

b. Plaintiffs CARTER, HEAD and McSHAN and those similarly situated are Negro citizens of the United States, State of Alabama, Greene County, and are residents of Greene County, Alabama. Plaintiffs are fully qualified under the laws of Alabama to serve as jurors in the Circuit Court of Greene County and desire to so serve but have never been summoned to jury service by the Defendants, their

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officers, agents, servants, employees or attorneys and those persons in active concert or participation with them.

5. a. Defendants MORROW, GRAY, DURRETTE and YARBOROUGH are members and clerk, respectively, of Defendant JURY COMMISSION, whose duties include choosing those who shall be eligible to serve on Grand and Petit Juries for Greene County, Alabama.

b. Defendant HILDRETH is the Judge of the Circuit Court for the 17th Judicial District, Greene County, Alabama, who will hear the case of the *People v. Paul M. Bokulich*, and who shall draw the names of prospective Grand and Petit Jurors.

c. Defendants BOGGS and BANKS, the District Attorney and the County Attorney, respectively, will jointly or severally present the People's case in the matter of *People v. Paul M. Bokulich* before the Greene County Grand Jury on September 19, 1966.

d. Defendant WALLACE is Governor of the State of Alabama whose duties include appointing the members of the Defendant JURY COMMISSION.

6. The Alabama Statutes relating to the selection of jurors provide, in part, as follows:

a. Code of Ala., Tit. 30, Section 4: "*Any person who appears to the court to be unfit to serve on the jury, may be excused on his own motion, or at the instance of either party.*" (Emphasis Supplied)

b. Code of Ala., Tit. 30, Sections 8, 9, 10, 15: "There shall be a jury commission in every county in this state . . . composed of three members . . . to be appointed

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by the Governor. . . . the clerk of the Circuit Court may be employed as the clerk of the jury commission"

c. Code of Ala., Tit. 30, Section 20: "The jury commission . . . shall make in a well bound book a roll containing the name of every male citizen living in the county who possessed the qualifications herein prescribed and who is not exempted by law from serving on juries."

[21] d. Code of Ala., Tit. 30, Section 21: "The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless he is willing to do so."

e. Code of Ala., Tit. 30, Section 24: "The jury commission is charged with the duty of seeing that the name of every person possessing the qualifications prescribed in this chapter to serve as a juror and

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not exempted by law from jury duty, is placed on the jury roll and in the jury box. . . . The jury commission shall require the clerk of the commission to scan the registration lists, the lists returned to the tax assessor, any city directories, telephone directories, and any and every other source of information from which he may obtain information, and to visit every precinct at least once a year to enable the jury commission to properly perform the duties required of it by this chapter. . . .”

f. Code of Ala., Tit. 30, Section 30: “At any session of a court requiring jurors for the next session, the judge, or where there are more than one, then any one of the judges of the court shall draw from the jury box in open court the names of not less than fifty persons to supply the grand jury for such session and petit juries for the first week of such session of the court, or if a grand jury is not needed for the session at least thirty persons, and as many more persons as may be needed for jury service in courts having more than one division for the first week, and after each name is drawn it shall not be returned to the jury box, and there shall be no selection of names, and must seal up the names thus drawn, and retain possession thereof, without disclosing who are drawn until twenty days before the first day of the session of the court for which the jurors are to serve, when he shall forward these names by mail or express, or hand the same to the clerk of the court who shall thereupon open the package, make a list of the names drawn, showing the day on which the jurors shall appear and in what court they shall serve, and entering opposite every name the occupation of

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the person, his place of business, and of residence, and issue a venire containing said names and information to the sheriff who shall forthwith summon the persons named thereon to appear and serve as jurors."

g. Code of Ala., Tit. 30, Section 60: "In every criminal case the jury shall be drawn, selected and empaneled as follows: Upon the trial by jury in any court of any person indicted for a misdemeanor, or felonies not punished capitally, or in case of appeals from lower courts, the court shall require two lists of all the regular jurors empaneled for the week, who are competent to try the defendant, to be made and the solicitor shall be required first to strike from the list the name of one juror and the defendant shall strike two, and they shall continue to strike off names alternately until only twelve jurors remain on the list, and these twelve thus selected shall be the jury charged with the trial of the case."

[22] 7. The total population of Greene County, according to the 1960 Census, is 13,600 of whom 2,545 are white, 11,050 are Negro and 4 are Indian. In the total male population from 21 to 64 inclusive, there are 649 white citizens and 1,782 non-white citizens. Of total males 21 and over, 775 are white and 2,247 are non-white. The ratio in each category is approximately one white citizen to three Negro citizens, i.e., the county is over 65% Negro.

8. This Court, by Judge Grooms, in the case *Coleman et al. v. Barton et al.*, Civil Action No. 63-4, made, *inter alia*, the following findings for Greene County, Alabama in 1964:

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The jury records do not reveal the number of whites and non-whites on the jury roll. The evidence did not reveal the exact number of each on the roll. According to the best information available, there were on the roll and in the box, for 1961, 353 names of whom 16 were known to be Negroes. For 1962, of the 374 names on the roll, 28 were identified to be Negroes. Allowing for those not identified by race not more than 10% of the roll are Negroes, although there were estimates running to 20%.

. . .

The evidence establishes that for a good many years Negroes have been called for jury duty in approximately the same ratio as the number on the jury roll. Ten appears to be the largest number ever present for jury duty; few actually serve. There was one on the petit jury in March 1964, and three in September 1963. As many as three or four have served on grand juries. No Negro has ever served as a foreman.

. . .

The Clerk of the Jury Commission has failed to comply with Section 24 in failing to visit every precinct at least once a year to enable the Commission to properly perform its duties as required by law. The legality of the jury roll is in controversy.

9. Upon information and belief, the jury list for the September, 1966 term of the Circuit Court for the 17th Judicial Circuit, Greene County, Alabama, consists of 65 names of which 19 are Negro, or approximately 30%. In Greene County, Alabama, where voting-age Negroes constitute over 65% of the voting-age population, the purposeful

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racial discrimination in compiling the jury list is shown by underrepresentation by as much as 35%.

10. Plaintiffs aver that the Defendants, their officers, agents, servants, employees or attorneys and those persons in active concert or participation with them have failed to select or summon the Negro Plaintiffs and the class they represent for jury service solely because they are members of the Negro race by systematically excluding them from the roll of names placed in the jury boxes and drawn and summoned for jury duty.

[23] 11. The failure of the Defendants, their officers, agents, servants, employees or attorneys and those persons in active concert or participation with them to summon the Negro Plaintiffs and the class they represent for jury service results in purposeful discrimination based on race alone and the resulting systematic exclusion of Negroes on juries, grand and petit, in the Circuit Court of Greene County, Alabama, and, in particular, on the Greene County Grand Jury scheduled to sit on September 19, 1966.

12. Plaintiffs show that this is a proceeding wherein they seek a declaration that the Defendants, their officers, agents, servants, employees or attorneys and those persons in active concert or participation with them, by utilizing, enforcing and maintaining a policy, custom, practice, scheme or usage arbitrarily, intentionally, and systematically exclude qualified Negroes from jury service in the Circuit Court of Greene County, Alabama, in violation of the Fourteenth Amendment of the Constitution of the United States and the laws of the United States made

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pursuant thereto. Plaintiffs further seek an injunction correcting the abuses set forth herein.

13. a. There is between the parties an actual controversy as herein set forth. The Plaintiffs and others similarly situated and affected on whose behalf this suit is brought, are suffering irreparable injury in the future by reason of the acts herein complained of; they have no plain, adequate or complete remedy to redress the wrongs and unlawful acts herein complained of, other than this action for a declaration of rights and an injunction; any other remedy to which Plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause further irreparable injury, damage and inconvenience to the Plaintiffs and those similarly situated.

b. Plaintiff BOKULICH will be irreparably injured in that his case will be presented to a Grand Jury from which Negroes have been systematically excluded, and will be tried before a Petit Jury from which Negroes have been systematically excluded.

c. The other Plaintiffs and those similarly situated will be irreparably injured in that they have not and will not be permitted the opportunity to serve on the Grand or Petit Juries for Greene County, Alabama for the September, 1966 term of the Circuit Court for the 17th Judicial District, Greene County, Alabama.

[24] 14. At all times hereinbefore mentioned, Defendants acted under color of the statutes, ordinances, regulations, customs or usage of the State of Alabama.

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15. The actions of Defendants hereinbefore described deprived Plaintiffs and those similarly situated of their rights, privileges and immunities secured by the Constitution and the laws of the United States, specifically their right to Due Process of Law and Equal Protection of the Laws under the Fourteenth Amendment and the laws of the United States pursuant thereto.

SECOND CLAIM

16. Plaintiffs repeat and reallege the First Claim for the same force and effect as if fully set forth herein.

17. The Negro Plaintiffs aver that they and the class they represent are also excluded from serving as jurors for Greene County, Alabama, by the utilization of Code of Ala., Tit. 30, Section 4 and 21 in that these statutes are so vague and lacking in standards that they deprive the Negro Plaintiffs and the class they represent of their Constitutional rights without due process of law by permitting wholesale, purposeful discrimination at the whim and caprice of these Defendants above named.

a. Defendant JURY COMMISSION arbitrarily rejects all Negroes *who are not in the opinion of the Defendant JURY COMMISSION* "generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment."

b. Defendant HILDRETH at the instance of Defendants BANKS and BOGGS may reject "any person who *appears* to the court to be unfit to serve on the jury . . ." (Emphasis Supplied)

18. Plaintiffs show that this is a proceeding wherein they seek a declaration that Code of Ala., Tit. 30, Section 4

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and 21 violate the Fourteenth Amendment to the United States Constitution and enjoining the utilization of said statutes.

THIRD CLAIM

19. Plaintiffs repeat and reallege the First and Second Claims with the same force and effect as if fully set forth herein.

[25] 20. Defendant JURY COMMISSION, which has caused the systematic exclusion of Negroes from the Grand and Petit Juries for Greene County, Alabama by purposeful discrimination as hereinbefore set forth in the First Claim and by the utilization of the vague "rejection" statutes as hereinbefore set forth in the Second Claim, has been deliberately constituted by Defendant WALLACE and those associated with and responsible to him on a segregated basis excluding any Negroes.

21. Plaintiffs show that this is a proceeding wherein they seek a declaration that Defendant JURY COMMISSION is a deliberately segregated body appointed by a State Official in clear violation of the provisions of the Constitution of the United States, and compelling Defendant WALLACE to select new members of Defendant JURY COMMISSION without discrimination.

FOURTH CLAIM

22. Plaintiffs repeat and reallege the First, Second and Third Claims with the same force and effect as if fully set forth herein.

23. Article I, Section 1 of the Constitution of Alabama of 1901 guarantees the equality of all men; Section 6

Amended Complaint

guarantees due process of law; section 11 guarantees the right of trial by jury; section 13 provides that all courts shall be open, every person for any injury done him shall have a remedy by due process of law, and rights and justice shall be administered without sale, denial or delay; section 32 guarantees that no form of slavery shall exist in the state, and that there shall not be any involuntary servitude, otherwise than for the punishment of crime, of which the party shall have been duly convicted; and section 35 provides that the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property.

24. The arbitrary or systematic exclusion of Negroes from jury service deprives that class of citizens of the full and equal enjoyment of the rights set forth above and guaranteed by the Constitution of Alabama, 1901, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and the laws of the United States.

[26] WHEREFORE, Petitioners on behalf of themselves and those they represent and all others similarly situated pray that this Court:

- a. assume jurisdiction in this matter;
- b. convene a three-judge Federal District Court to hear and determine this proceeding;
- c. enter judgment declaring that:
 - (1) qualified Negroes are systematically excluded from the Grand and Petit Juries for the September, 1966, term of the Circuit Court for the 17th Judicial District, Greene County, Alabama,

Amended Complaint

(2) Code of Ala., Tit. 30, Sections 4 and 21 are unconstitutional on their face in violation of the Fourteenth Amendment to the United States Constitution,

(3) Code of Ala., Tit. 30, Sections 4 and 21 are unconstitutional as applied to Plaintiffs and those similarly situated in that these statutes are presently being used to arbitrarily reject Negroes from the Grand and Petit Juries for the September, 1966, term of the Circuit Court for the 17th Judicial District, Greene County, Alabama, and

(4) The Defendant JURY COMMISSION of GREENE COUNTY, ALABAMA is deliberately segregated governmental agency appointed by Defendant WALLACE, an official of the State of Alabama, in violation of the Fourteenth Amendment to the United States Constitution.

d. issue a Preliminary Injunction:

(1) enjoining and restraining Defendants, their employees, agents, successors, and all persons acting in concert and participation with them, from presenting the action pending against Plaintiff BOKULICH in the Circuit Court for the 17th Judicial District, Greene County, Alabama before a Grand Jury until a non-segregated JURY COMMISSION has been appointed and until Negroes are not systematically excluded from the Grand Jury for Greene County, Alabama.

e. issue a Permanent Injunction:

(1) enjoining and restraining Defendants, their employees, agents, successors, and all persons acting

Amended Complaint

in concert and participation with them, from presenting the action pending against Plaintiff BOKULICH in the Circuit Court for the 17th Judicial District, Greene County, Alabama before a Grand and Petit Jury until a non-segregated JURY COMMISSION has been appointed and until Negroes are not systematically excluded from the Petit Jury for Greene County, Alabama,

(2) enjoining and restraining Defendants from systematically excluding Negroes from service upon the Grand and Petit Juries for Greene County, Alabama,

(3) compelling Defendant JURY COMMISSION and its Defendant members to place all eligible Negro residents of Greene County, Alabama on the jury roll, the jury list and the jury box for Greene County, Alabama,

[27] (4) enjoining and restraining Defendants JURY COMMISSION and its Defendant members, and Defendants BOGGS and BANKS from rejecting eligible Negro residents of Greene County, Alabama from the jury roll, the jury list and the jury box for Greene County, Alabama pursuant to Code of Ala., Tit. 30, Sections 4 and 21 for reasons of race and color, and

(5) vacating the appointment of the segregated, all-white Defendant JURY COMMISSION, declaring Defendant JURY COMMISSION vacant, and compelling Defendant WALLACE to select new members without discrimination.

Amended Complaint

- f. grant such other and further relief as may be proper and necessary.

/s/ DONALD A. JELINEK
DONALD A. JELINEK
Lawyers Constitutional Defense
Committee
31½ Franklin Street
Selma, Alabama

ALVIN J. BRONSTEIN
Lawyers Constitutional Defense
Committee
603 North Farish Street
Jackson, Mississippi

[31]

Order Designating Three-Judge Court

(Filed September 29, 1966)

(Title Omitted in Printing)

The Honorable H. Hobart Grooms, United States District Judge for the Northern District of Alabama, to whom an application for injunction and other relief has been presented in the above styled and numbered cause, having notified me that the action is one required by act of Congress to be heard and determined by a district court of three judges, I, Elbert P. Tuttle, Chief Judge of the Fifth Circuit, hereby designate the Honorable John C. Godbold, United States Circuit Judge, and Honorable Clarence W. Allgood, United States District Judge for the Northern District of Alabama, to serve with Judge Grooms as members of, and with him to constitute the said court to hear and determine the action.

WITNESS my hand this 28th day of September, 1966.

/s/ ELBERT P. TUTTLE
 Elbert P. Tuttle
 Chief Judge
 Fifth Circuit

[STAMP]

A TRUE COPY
 WILLIAM E. DAVIS
 CLERK, U. S. DISTRICT COURT
 Northern District of Alabama
 By /s/ M. CLAIRE PARSONS
 Deputy Clerk

[51]**Answer****(Filed April 13, 1967)****(Title Omitted in Printing)**

Come now the defendants and answer the amended complaint filed by the plaintiffs in the above-styled cause on the following separate and several grounds:

1. The complaint fails to state a cause of action against the defendants for which relief can be granted.

[52] 2. Based on the allegations of the complaint, this court is without jurisdiction to grant the relief prayed for in the complaint.

3. There are no constitutional or statutory provisions of the State of Alabama or of the United States which require that a county's jury roll or jury box be constituted on the exact ratio of the county's white male population twenty-one years of age and over, to the county's Negro or non-white male population twenty-one years of age and over.

4. There is no requirement by statute or otherwise that Jury Commissioners of the State of Alabama be appointed from any particular racial, ethnic or religious group by the Governor of Alabama. Sole discretion in making appointments to the various Alabama Jury Commissions, so long as the selection of said persons is made pursuant to the qualifications prescribed by Title 30, Section 9, Code of Alabama 1940, as Recompiled 1958, is reposed in the Governor of Alabama.

Answer

5. The defendants deny each and every allegation of the amended complaint filed in the above-styled cause of action.

/s/ MACDONALD GALLION

MacDonald Gallion

Attorney General

/s/ ROBERT P. BRADLEY

Robert P. Bradley

Assistant Attorney General

/s/ THOMAS H. BOGGS

Thomas H. Boggs

District Attorney,

17th Judicial Circuit of Alabama

/s/ RALPH BANKS, JR.

Ralph Banks, Jr.

County Attorney,

Greene County, Alabama

Attorneys for Defendants

(Certificate of Service Omitted in Printing)

[1]

Deposition of Mary C. Yarborough

(Title Omitted in Printing)

STIPULATED

IT IS STIPULATED AND AGREED by and between the parties through their respective counsel, that the deposition of Mary C. Yarborough, may be taken before Robin L. Tribble, Commissioner, Greene County Courthouse, Eutaw, Alabama, on the 10th day of November, 1966.

IT IS FURTHER STIPULATED AND AGREED that the signature to and the reading of the deposition by the witness is waived, the deposition to have the same force and effect as if full compliance had been had with all laws and rules of court relating to the taking of depositions.

IT IS FURTHER STIPULATED AND AGREED that it shall [2] not be necessary for any objections to be made by counsel to any questions, except as to form or leading questions, and that counsel for the parties may make objections and assign grounds at the time of the trial, or at the time said deposition is offered in evidence, or prior thereto.

IT IS FURTHER STIPULATED AND AGREED that Notice of filing of the deposition by the Commissioner is waived.

[3]

Eutaw, Alabama.

November 10, 1966.

BEFORE:

Robin L. Tribble, Commissioner.

APPEARANCES:

Messrs. Donald A. Jelinek, Attorney at Law, Lawyers Constitutional Defense Committee, 31½ Franklin Street, Selma, Alabama, and Orzell Billingsley, Jr., Attorney at

Deposition of Mary C. Yarborough

Law, Masonic Temple Building, 1630 4th Avenue North, Birmingham, Alabama, appearing for the Plaintiff.

Mr. Robert P. Bradley, Assistant Attorney General, State of Alabama, Montgomery, Alabama, and Mr. Ralph Banks, Jr., County Attorney for Greene [4] County, Alabama, Eutaw, Alabama, appearing for the Defendants.

[5] I, Robin L. Tribble, a Court Reporter of Birmingham, Alabama, acting as Commissioner, certify that on this date, as provided by the Rules of Civil Procedure of the United States District Court, and the foregoing stipulation of counsel, there came before me at the Greene County Courthouse, Eutaw, Alabama, beginning at 10:10 A. M., Mary C. Yarborough, witness in the above cause, for oral examination, whereupon the following proceedings were had:

MARY C. YARBOROUGH, being first duly sworn, was examined and testified as follows:

Examination by Mr. Jelinek:

Q. Are you Mary C. Yarborough? A. Yes.

Q. And you are the Clerk of the Jury Commission? A. I am.

Q. You are Clerk of the Circuit Court and Register of Greene County? A. That is correct.

Q. And how long have you been Clerk of the Jury [6] Commission? A. Twelve years.

Q. And you were appointed— A. Approximately. I think that is about right.

Q. And is this in an appointed position? A. As far as I know, it is one of the duties that goes with the Circuit Clerk's job.

Q. And is the Circuit Clerk an appointed job? A. No. It is an elected job.

Deposition of Mary C. Yarborough

Q. An elected job? A. Yes.

Q. And are there other members—you are a member then of the Jury Commission? A. I don't think I would be considered necessarily a member of the Jury Commission. I am simply acting as Clerk of the Jury Commission.

Q. And the Jury Commission has three members, is that correct? A. Yes, sir.

Q. And do you know their names? A. Yes.

Q. What are they? A. Mr. Albert Gray, Mr. Melvin Durette, and Mr. [7] Walter Morrow.

Q. And do you know if they were appointed or elected? A. I presume they were appointed.

Q. And would that be by the governor? A. I think so.

Q. Do you know when each of them were appointed?

A. No. I am not sure. Mr. Durette was with us for the first time this last time the Commission met, and Mr. Gray has been with us for two, three, or four years. Three or four years.

Mr. Gray: Three.

A. Mr. Morrow has been here for a good many years.

Q. Have you ever met any other jury commissions?

A. You mean other than the Greene County Jury Commission?

Q. That is right. A. No.

Q. Have you seen other members of a Jury Commission in Greene County? A. No. Well, I have seen—

Q. Other members composed of this jury commission I should say. I withdraw that question. [8] A. You are confusing me.

Q. Right. A. If you mean have other people served on the Jury Commission while I have been Clerk—

Deposition of Mary C. Yarborough

Q. That is correct. A. I have, but there have only been one jury commission of Greene County at any one time.

Q. And how many different members have served since you have been here? A. Mr. Jelinek, I can't remember.

Q. Would it be more than ten? A. Over a period—I don't think so, no. I am trying to think who the others have been.

Q. You don't have to name them. I am more interested in the number. A. I think there have been three or four of us maybe. Not more than three.

Q. In addition to the present three? A. Yes.

Q. And am I correct that all of them have been members of the white race?

Mr. Banks: Don't answer that question, please, ma'am. It is entirely discretionary with the [9] governor. She will answer—

Mr. Jelinek: What is your objection?

Mr. Banks: The race of the jury commission is immaterial. The governor has complete discretion as to whom he sees fit to appoint.

Mr. Jelinek: But this is a specific allegation in the complaint. This is one of the items in the allegations, charging of the race is in the allegation.

Mr. Banks: I think that allegation is immaterial.

Mr. Jelinek: You move to dismiss it?

Mr. Banks: Until she is ordered to by a Federal Judge she is not going to answer that question.

Mr. Jelinek: Well, that is what we will have to have ordered. We will have to continue this in Birmingham on that point.

Mr. Banks: All right.

Mr. Jelinek: I think—would it be a fair question

Deposition of Mary C. Yarborough

that you yourself and the present members of the jury commission are all white?

Mr. Banks: Don't answer that question. As for yourself you may answer it. Go ahead and answer it [10] for yourself.

By Mr. Jelinek:

Q. You are white, is that correct? A. Yes; I am.

Q. And two out of the three members of the jury commission sitting in this room would appear to be white, is that correct? A. I think so.

Q. I would think so. This is Mr. Durette, and excuse me, Mr. Gray, right?

Mr. Gray: Right.

Q. Right. Now, among the duties of the Clerk of the Jury Commission is to compile names for the jury roll, is that correct? A. That is correct.

Q. And is it also part of your duties—well, pursuant to those duties, you are to compile a list of all and every male citizen over 21 years of age and under 65 and their occupations and place of residence and place of business?

A. To the best of your ability.

Q. Right. Have you done this for—well, of late? A. We have always done it.

[11] Q. And when was this last done? A. In August.

Q. Of 1966? A. That is right.

Q. When was it done before that? A. It is done each August.

Q. Each August. A. There is no particular date. We try to work out a date that is agreeable with all of the Commission members.

Q. Now, do you have a copy of that list available? A. I don't have a list of it, Mr. Jelinek.

Deposition of Mary C. Yarborough

Q. Well, do I understand that you don't prepare a list? A. Are you asking me if I have a list of the jury roll?

Q. No. Starting off insofar as you are required to obtain the names of the eligible people to the best of your ability? A. You mean where do I get those lists and do I keep them?

Q. I am asking what you do physically with the names when you acquire them each August. For instance, [12] this August? A. Well, this August—can't I just tell you in my own words?

Q. Yes. A. Your questions confuse me a little bit.

Q. Fine. Why don't you? A. We take a list of all qualified voters of the county. We take the telephone book. We go out into the beats in the county and ask around the neighborhoods there of any people that they know who have become 21 or who have moved into the county and have been in the county for over a year in order that they might serve.

We have written letters to various people. We have made telephone calls and have had various people bring this to us that we have worked from.

Q. And after you have done this, what do you do with the names? A. We check to see if there is a criminal record, and those people with criminal records are automatically excluded.

If there is nothing morally wrong with them and they are people of average intelligence, then they [13] are put into the jury box.

Q. Well, first they come to the jury roll, is that correct? A. Well, the jury roll and the jury box work hand in hand. For each card that is put in the jury box, the name is put on the jury roll.

Deposition of Mary C. Yarborough

Q. Well, now, for example this August, you went out into the county? A. That is correct.

Q. Did you go to every precinct? A. Yes.

Q. You yourself or do you break it up with the members of the commission? A. During the year—now, I did not go out a few days beforehand, but during the year I have been to every precinct in the county myself and other members have also been out.

Q. You yourself went to every precinct? A. Yes.

Q. And how many precincts are there? A. There are 13. Well, no. There are not either. There are 13 beats in the county. Actually, there are—

【14】 Q. 12 precincts? A. Eutaw, Forkland, Boligee, Pleasant Ridge, Knoxville—

Mr. Banks: Off the record.

(Off the record discussion.)

A. 11. I could count them up.

Q. What records do you keep if any of your visits? A. I don't keep any.

Q. Do you get paid a certain amount of money for each day you work as a jury clerk? A. I did in the past. I don't any longer. I am not on a commission basis now.

Q. Well, has the law changed or have you just stopped asking for it? A. Well, no. As far as I know, the Clerk of the Jury Commission is allowed \$5.00 a day. The Jury Commission members, I think possibly are allowed \$10.00 for each day that you go out, but that is a part of my duty as Circuit Clerk, and therefore, I do not claim it.

Q. I see. So, you keep no records then of when you go out. You wouldn't have a notation that said you 【15】 went to this precinct on this day or et cetera? A. No, sir.

Deposition of Mary C. Yarborough

Q. Now, when you start off, you prepare a new list every August? A. Yes.

Q. Every year? A. Yes; we do.

Q. Now, I presume you take the old list as a starting point, is that right? A. Well, you have your roll. It is listed alphabetically, and then you do take that as a base and then you add—I mean, when you are going to the A's, you go through your voting list, you go through your telephone book, and you go through the list of your people, and then you add the A's to your list. Then you go down beat by beat alphabetically and go on down that way.

Q. Now, when you go to a precinct such as—what is the nearest precinct to here? A. Clinton, I guess would be.

Q. All right. When you go to Clinton, what do you actually do? A. Well, I usually stop by the store out there [16] and see Mr. King.

Q. Who is Mr. King? A. Mr. King is a land owner at Clinton that knows just about everybody in the community.

Q. I am going to address the rest of these questions now specifically to Negro names that you obtained— A. Yes.

Q. —in order not to unduly prolong this. A. All right.

Q. In acquiring Negro names in this precinct, in Clinton, what procedures did you follow? A. I asked Mr. King specifically if he knew any Negroes, and I believe he gave me the names of one or two, but I cannot remember who they were.

Q. Mr. Clinton is a Negro? A. No. Mr. King is white.

Q. Mr. King rather. All right. A. I don't happen to know any of the Negroes in the Clinton community.

Q. And he gave you one or two names you believe? A. That is right.

[17] Q. Did you see anyone else to find names in Clinton? A. I talked with Mr. Marvin Porter, and I talked

Deposition of Mary C. Yarborough

with Howard Brown, the deputy sheriff here whose family lived near Clinton.

Q. Who is Mr. Porter? A. He is a merchant in Clinton.

Q. White or Negro?

Mr. Banks: Off the record now.

(Off the record discussion.)

By Mr. Jelinek:

Q. He is postmaster also. Mr. Brown is the deputy sheriff— A. That is right.

Q. —appointed by the sheriff of Greene County? A. That is right.

Q. Anyone else? He doesn't live in Clinton? A. No, but his family lives there.

Q. And Mr. King lives in Clinton? A. He does.

Q. And Mr. Porter? A. Yes.

Q. And did you speak to anyone else about Clinton?

[18] A. I spoke to Boyd Crawford?

Q. And is he Negro or white? A. He is a Negro.

Q. And what does he do? A. Well, Boyd is retired right now. He was a contractor.

Q. Anyone else in Clinton? A. I don't believe so. I can't really recall. It is possible I talked to someone else, but I can't remember.

Q. Do you know how many names you got from these people? A. No.

Q. Do you know how many names eventually went into the jury list from Clinton? A. No; I don't.

Q. I should say the jury roll? A. No; I don't.

Q. Did you go to any of the Negro schools in Clinton? A. No.

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Q. Did you see any of the ministers, Negro ministers in Clinton? [19] A. I don't know any of the ministers in Clinton or the school teachers there either.

Mr. Banks: Let's go off the record again.

(Off the record discussion.)

By Mr. Jelinek:

Q. But you don't know the Negro ministers? A. No; I don't.

Q. And how about Negro fraternal organizations in Clinton? A. Well, I don't know what they would be. I don't know the Negroes in Clinton, Mr. Jelinek. I have contacted the Negroes that I have known throughout the county. Some of them have been schoolteachers.

I have gotten lists from Mr. Young, the principal of the school. I have gotten lists from Beasley, who was principal of the school here. I have gotten lists from Martin Woodson at Mantua. I have gotten lists from Archie Brown. I have gotten lists from Thomas Crawford. I have gotten lists from numbers of Negroes.

We have made a conscientious effort to put the Negroes who were capable of serving that were clean morally on the juries in Greene County.

[20] Q. But as far as going out—well, to put it another way—I withdraw that.

There could be some eligible Negroes in, for instance, Clinton— A. There could.

Q. —which you don't know about, because unfortunately you are not familiar with them? A. It is possible. Of course, there could be eligible white people that I don't know about.

Deposition of Mary C. Yarborough

Q. True. That is correct. This is a problem of not being familiar with the community? A. It is a problem for any jury commission to find every eligible person in the county whether they are black or white.

Q. Do you think that if you had a Negro jury commissioner you would have more of a representative section? A. I don't think so, because I think the Negroes that I have contacted are quite familiar with the Negroes in the county. I feel quite sure they have given me long lists and they have discussed with me the qualifications of the people on the list that they have given me.

【21】 They have questioned some of the people they put down.

They said, now, this person I think is all right, but I am not sure. He may possibly have a liquor record.

Q. Committed a crime? A. Might have a liquor record somewhere back, but he is really a pretty good guy.

Q. Do you have copies of the lists? A. I think maybe there could be one or two stuck in the jury roll. Should I look?

Mr. Banks: Do you have them or do you say you don't know?

A. I don't know. I can look and see.

Mr. Banks: If you don't know, just say you don't know.

Mr. Jelinek: We would like for her to take a look and see if it is there.

A. All right. Here is a list that Boyd Crawford gave me this time. Here is a list that Professor Young gave me and

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here is a list that Martin Woodson gave me this time. These people that gave me lists are all Negroes.

【22】 Here are lists that Howard Brown gave me. I kind of think that that list—I wouldn't be sure about that. I think Beasley gave me that, but I wouldn't say so.

Mr. Banks: Well, do you want to state in your best judgment he gave it to you?

Mr. Jelinek: That would be good enough for me.

A. He gave me one. Now, whether this is it, I don't know.

Mr. Banks: You mean this list, Mrs. Yarborough?

A. Yes.

Mr. Banks: Is this the one you are referring to?

A. Yes.

Mr. Jelinek: Well, we will take it subject to—

A. Well, I am not sure at all.

Mr. Jelinek: —objection. All right.

A. I think it is possible. I know I got it from some colored person, but who it is, I don't know.

Q. And this is the list now marked under J. C. 【23】 Coleman Insurance Agency stationery? A. Yes. I think I gave them some of my stationery.

Mr. Jelinek: I would like to have this marked for identification, if I may, and I think Mr. Bradley and I—off the record.

(Off the record discussion.)

(Whereupon, said lists were received and marked for identification as Plaintiff's Exhibits 1

Deposition of Mary C. Yarborough

through 5 to the deposition of Mary C. Yarborough.)

By Mr. Jelinek:

Q. Now, as to other precincts such as Forkland, you went physically to Forkland? A. Yes.

Q. Do you know any Negroes there of your own knowledge? A. No; I don't. Mr. Barton from Forkland was on the Jury Commission one time, and I usually went to his store and discussed them with him.

Q. And now in August and— A. I think it was back in the spring when I was down there.

Q. Oh. That is right. The list is done in August, but you do it through the year? A. Yes.

【24】 Q. The time you went—let's call this the 1966 jury roll. A. All right.

Q. In preparation of this one, who did you see in Forkland? A. I saw Mr. Barton.

Q. And he was not a member at that time when you went to see him? A. No. He doesn't hear well any more.

Q. And then you spoke with him and he made— A. Yes.

Q. —and he made recommendations? A. Yes.

Q. Any new ones, new Negro names? A. To tell you the truth, I do not remember—

Q. All right. A. —about white or Negroes. I just remember going down there and I used to see Mr. and Mrs. May when they run the post office there and asked them, but they are both dead now.

Q. Did you see any Negro people? A. No. I don't believe I know a single Negro down there.

【25】 Q. And when I say you, does this include all members of the Jury Commission? A. Now, where they have been, they have been on their own. I have not been with

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any of the members of the Jury Commission into the precincts.

Q. Right. Well, let me ask you this— A. But I am sure that they have no doubt contacted some of the Negroes that they knew.

Q. The other members of the Commission? A. They have said so.

Q. And the other members of the Commission gave you names in addition to your own names? A. Yes, sir.

Q. Well, just rely on what you know of your own knowledge. You yourself did not speak to any of the Negroes in the Forkland precinct? A. No. I don't believe so. In fact, I know I didn't.

Q. In Boligee, you had the professor? A. Yes.

Q. He is a Negro professor? A. That is right.

Q. Now, other than the professor then, what was his [26] name again? A. Young.

Q. Professor Young in Boligee? A. I believe he is the only Negro there that I have known to contact. No. I think I tried to get Shaw this time and never could get him on the telephone.

Q. Now, what about Entaw? A. Well, I have talked to a number of Negroes in Entaw through the years. One of them, Mr. Bokulich probably knows was my cook, and I thought the world of her, Bell Flanigan.

Q. But she is not with you now? A. She is not with me and hasn't been in years.

Q. I am talking about in 1966. A. I talked to Mr. Brown this time and Crawford, and talked to Zelma Brown. She got me some names from a girl who worked in her store.

I talked to Beasley back during the year before he—now, that wouldn't have been this year. I take that back.

Deposition of Mary C. Yarborough

I talked to Velma Cherry who did work for me, and I just can't remember. I mean, it is hard to [27] think about who you talked to and when you talked to them.

Q. Eutaw is, of course, in the area—this is the Eutaw precinct? A. Yes.

Q. And this is where people come and go, so you have a large acquaintance? A. Yes.

Q. And you know probably a lot of Negroes personally in Eutaw? A. I know a good many personally here in town. Not a lot, but a fair amount.

Q. All right. Now, what about West Greene. By the way, what precinct do you live in? A. I live here in Eutaw.

Q. Eutaw? A. Yes.

Q. What about West Greene now? A. I have talked to the Williams that live at West Greene.

Q. Negro? A. No. They are white. The Owens—no, they are at Pleasant Ridge, aren't they. I have talked [28] to the Montgomerys at West Greene.

Q. White? A. White. They know everybody out there. It is a very small community.

Q. And that is about all you spoke to out there? A. Yes.

Q. What about Mt. Hebern? A. Well, I have talked to Jamie Campbell out there.

Q. White? A. White. They have a store there. In the past I have talked to Mr. Tom Palmer when he was postmaster and had a little store there, but he is not there any longer. They don't have a post office any more.

Q. White? A. Yes.

Q. That is about all for that? A. Yes.

Q. How about Pleasant Ridge? A. The Owens and the Steels, white. That is about it, I guess.

Q. Mantua? [29] A. Mantua. I talked to Martin Woodson there who is a Negro.

Deposition of Mary C. Yarborough

Q. What does he do? A. Well, he used to teach, and I think he farms now.

Q. All right. A. And I have talked to the Eatmans that have a store there in Mantua.

Q. White? A. White.

Q. And that is about all for Mantua? A. That is about it for Mantua, I think.

Q. Union? A. Well, I have been to the Chambers' store at Union. I have been to Friday's store at Union, and to the Pierces. They are all white. I don't know any of the Negroes at Union.

Q. Okay. Knoxville. A. Well, I have been to the little store there, to both stores. To Mr. May's when he had one, but it is not there any longer and to Jim Campbell's store, and I have talked to him. They are white. I don't know any of the Negroes at Knoxville.

【30】 Q. And Springfield? A. I have talked with Louis Broxnax at Springfield, and he is white. I don't know any of the Negroes in Springfield.

Q. Is that all of the precincts? A. Well, let me think.

Mr. Jelinek: Off the record.

(Off the record discussion.)

A. That is it.

Q. Okay. Now, for example, you spoke to a Negro woman in Eutaw, I think you said, and she had a girlfriend who worked in a store? A. Yes.

Q. And she gave you a list? A. Yes; she did.

Q. Now, what did you do with the names when you got them? I mean, did you know if these people were reputable? A. That is one of the troubles about getting these names. You invariably—with some people that you have, you

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invariably come up with some people that have been convicted.

Q. But other than convictions which is on record, [31] you wouldn't know whether they had high moral character other than the fact that someone told you? A. Unless you happened to know them, you don't know.

Q. I mean, if Professor Young tells you that John Brown, I recommend him, he is of high moral character, maybe Professor Young is wrong or not telling you the truth? A. Well, he could be. I have no other way of finding out otherwise. The man would go into the jury box.

Q. Other than the criminal records, you would have to— A. Yes, sir.

Q. You base it on your esteem and regard for the person who gives it to you? A. That is right. I don't think that he would knowingly give me the name of somebody who was not all right.

Q. It is possible though that his judgment would be different than yours, isn't it? A. Well, I think I have fairly good intelligence [32] and I think he does too, so I am not so sure.

Q. Not as a matter of intelligence— A. No. I think he is a person of sound judgment. He is a person who has tried to better his race to do what he could toward teaching and toward educating, and I am sure that he is a person of good judgment that would recognize good from bad.

Q. Well, let me ask you the question this way then: You mentioned before finding people that are capable, clean morally, which I think is a very concise phrasing of the general language, reputed to be honest and intelligent and esteemed in the county for their character and sound judgment.

I think that is what it comes down to.

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Do you consider any crime to disqualify a person from being on the jury, any conviction or any crime? A. Well, now, there are petty things, but if it was a real crime, yes. I would say that they shouldn't be on it in my personal judgment.

Q. And, of course, you use your selection— A. I don't make the selection.

【33】 Q. Well, when you make the recommendation— A. I don't make recommendations. I simply give them the names to act on.

Q. Well, don't you— A. I tell them where I got the names.

Q. But you are required to originally prepare for the commission a list of those who you believe who are eligible, and they decide? A. I give them the list of all the names that are given to me and the decision is not mine. It is theirs.

Q. That is right. As a matter of fact— A. That may be wrong, but that is what I do.

Q. Your first job, isn't it, pursuant to Section 18 is to obtain the name of every male citizen over 21 and under 65 and their occupation, residence, and place of business? A. We do that to the best of our ability.

Q. Right. Now, of course, it is male and female now, right? A. Well, it will be next time we fill the jury box, I presume.

Q. That is right. Do you prepare a written list? 【34】 A. No; I don't. I do make notations, but I usually get a voting list and we go by that for the most part.

Q. Now, there are approximately— A. But you can't take a voting list and know all the people on it. There is no way on earth you can do it.

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Q. No. Of course not. There are approximately 2400 males, at least, by the 1960 census who are over 21 and under 65.

Now, did you prepare a list of that 2000 odd people? A. Not separately, no; I did not. I have actually no way of knowing. I can tell by the voting list where they have registered to vote if they are over 21, but there is no way on earth I can know if they are over 65 unless their names have been given to me by someone who does know about them.

If they are not on the voting list and they are not in the phone book and nobody happens to know them, then I have no way of obtaining that knowledge.

Q. First of all, the voting list, what is the registration figures now, roughly? [35] A. I don't have the vaguest idea. I know that sounds stupid, but I really don't.

Q. What was the total vote in the last election? A. I don't know.

Mr. Jelinek: Off the record.

(Off the record discussion.)

By Mr. Jelinek:

Q. Any way, you take it from the voting list. Can you find out that information, I mean, do you have that information? A. No; I don't.

Q. Do you have a thorough register here? Is there a federal register here? A. Yes, but on state registers you have more than one box.

Mr. Banks: She doesn't have that.

A. I don't have anything to do with that.

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Mr. Banks: The Probate Judge has that.

Mr. Jelinek: I am sorry.

Mr. Banks: She is the Register, not the Registrar.

Mr. Jelinek: Off the record.

(Off the record discussion.)

By Mr. Jelinek:

Q. You do not have those? [36] A. No, sir. I don't have any of those records.

Q. So you go through your voting list and then you go through—the telephone book? A. And you go into your precincts and you come up with some people that you don't find either place.

Q. Right. But even in your telephone book, that would only list the persons whose name it is in? A. That is right.

Q. You wouldn't know if they had a son or something? A. That is right.

Q. And through those two lists and when you go into the precinct as you discussed, the people give you some names and they only give you the names of those they think are eligible, right, or who are good people or are capable or morally clean? A. Well, I have never really particularly thought about it that way. I guess they probably do. I mean, if they knew something was wrong with somebody, I don't guess they would give me their name.

Q. You don't get a list. You don't go into [37] Clinton or let's say Boligee after speaking to Professor Young. In fact, in the letter you wrote to him which is Exhibit 1, July 13th, you asked him to supply a list of people qualified? A. Yes.

Q. So, of course, he wouldn't give you a list of people who he thinks are unqualified? A. That is right.

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Q. He gives you— A. He keeps me from wading through barrels of red tape.

Q. So he actually makes the judgment? A. Well, I told you that I considered his judgment sound.

Q. Right. Insofar as the information that you provide for the Jury Commission, they don't get the names of people who have been convicted of crimes for instance? A. Well, they do from—now, they can come up in the telephone book and in other places, in clubs and organizations.

Q. Would you say it is a fair statement that Negroes have less phones than whites in this [38] county? A. They probably do. I don't know.

Mr. Banks: Strike that from the record unless you know.

A. Well, I don't know.

Mr. Banks: All right. I want that excluded from the record, please.

Mr. Jelinek: Well, it is not excluded. I will let you put in an objection in the record.

Mr. Banks: All right.

By Mr. Jelinek:

Q. But insofar as your duties, and I understand the problem that is involved in this, but as far as the technical language of the statute, you really are unable to obtain a list of everyone over 21— A. Yes.

Q. —and under 65? A. It is impossible.

Q. All right. A. It is a physical impossibility.

Q. I think so. So, you really—outside of your voting list and your telephone book, you supplement that with the

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names of people who are considered by you [39] to be obviously eligible and not just over 21? A. That is right.

Q. To put it another way— A. You wouldn't knowingly put an alcoholic in regardless as to whether he had been convicted of a crime or not. Somebody like that, you wouldn't put in your jury box.

Q. Right. Now, back to the crimes, I think you said that there are some crimes— A. Well, if you mean parking tickets—

Q. I assume that you don't consider traffic at all as a crime to disqualify anyone, a traffic offense? A. Unless it is a DWI or leaving the scene of an accident.

Q. Or even reckless driving? A. Or reckless driving.

Q. What about a conviction for being drunk? A. Well, they don't go through my office, so unless a person had a bad reputation as far as I said, being an alcoholic—

Q. But I mean— A. I wouldn't know.

[40] Q. If a person had a conviction for drunkenness, would you disqualify him? A. If they had a reputation for drunkenness?

Q. No. A conviction of drunkenness. A. I think it completely depends on the circumstances. I don't think you can say you do this or you do that. Somebody who is normally fine could take one drink too many sometimes.

Q. Right. But what I mean is, I am not including the reputation now, I am assuming that it is somebody that you don't know, but all you know about them is they have been convicted of being drunk once. Would that disqualify them? A. No. I don't think it would.

Q. And what about assault and battery? A. I would say that assault—

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Mr. Banks: I am going to object to this line of questioning. There has been nothing—you are trying to make her state legal opinions.

Mr. Jelinek: No. No. All I want is her opinion insofar as her duties of choosing those or recommending those of high moral character, whether the conviction of assault and battery would have [41] a bearing on their high moral character.

Mr. Banks: Well, Mr. Jelinek, you know—this is off the record.

(Off the record discussion.)

By Mr. Jelinek:

Q. So you don't submit names of your own? A. No.

Q. From your own knowledge? A. No.

Q. I guess you would if you made a list up? A. Yes.

Q. But you don't submit the judgment? A. No; I don't. I have already told you that.

Q. Do you keep—do you make payments or does someone make payments to members of the Jury Commission?

A. No; I don't.

Q. Do you know who does?

Mr. Banks: If you don't know say you don't know.

A. I guess—you all are paid by the Probate Office, aren't you?

Q. And is it then the Probate Office—are there [42] any records kept by you of payments? A. No.

Q. Are there any vouchers submitted to you? A. No. I have nothing to do with it.

Q. All right. Did you speak to anyone about obtaining things or lists other than the names you have mentioned

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so far? A. Now, Mr. Jelinek, you know I told you that I can't remember all the people I talked to.

Q. I should say do you recall of any others right now that you haven't mentioned. I am sure that you overlooked some. A. If you mean this time—

Q. That is right. A. I don't think so. Eddie Webb—I guess Eddie has been gone more than that. No, I don't guess he has. He was a Negro that worked at the grocery store where I trade.

Q. Now, I understand that Mr. Morrow is ill? A. I understand he has a heart condition.

Q. All right. I have accepted Ralph Banks' statement that it would be injurious to his health to be here today.

[43] A. I would think so.

Q. That is good enough for me.

Now, can you tell me as far as you know how long he has been out? A. He hasn't been well for several years.

Q. Do you know if he has worked this year? A. Mr. Jelinek, I don't know. About the only time I saw Mr. Morrow is when the Jury Commission meets.

Q. And did the Jury Commission meet this year? A. Yes.

Q. And was that in August? A. Yes.

Q. Was it here? A. Yes; it was.

Q. In this office, in your office? A. Yes. He did serve at that time.

Q. He what? A. He did serve on the Jury Commission that day.

Q. He was there that day and there was just the four of you present? A. Yes.

[44] Q. Do you remember the date, the date in August? A. I don't.

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Q. Did you keep any records? A. Yes. There is a certificate that we sign and fill in at the end of the session that the Jury Commission meets. It would have a date on it.

Q. Is that the only record that you keep other than the lists themselves of the work of the Jury Commission? A. That is right.

Q. May I see that, please? A. It was the 16th of August.

Q. I guess I could read that into the record just as easily.

On your stationery, Mrs. Yarborough: "State of Alabama, County of Greene.

"We, the members of the Jury Commission of Greene County certify that numbers 1-774 inclusive are a true and correct number of names contained on the jury roll.

"Witness our hand this 16th day of August, [45] 1966."

Signed by Mr. Gray and Mr. Morrow and Mr. Durrette. Witnessed by Mrs. Yarborough, Clerk. A. That is correct.

Mr. Jelinek: May I have that marked for identification.

Ralph, I am going to have this marked—

Mr. Banks: Mark it for identification.

Mr. Jelinek: Just to be sure that I have made myself clear—off the record.

(Off the record discussion.)

(Whereupon, said certificate was received and marked for identification as Plaintiff's Exhibit 6 to the deposition of Mary C. Yarborough.)

By Mr. Jelinek:

Q. To make myself clear, this is the only document that was kept of the work of the Jury Commission as far as you know? A. That is correct.

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Q. There are no minutes— A. No.

Q. —or anything like that? A. No.

Q. Now, what is the place—incidentally, how [46] many hours does the meeting last? A. We usually start at eight in the morning and work until around five or six in the afternoon.

Q. And what takes place at the meeting? A. You have your list, you have your jury roll. I type the cards for new names that are added to the jury box. Mr. Durette, I believe did the writing of the jury roll, didn't you?

Mr. Durette: Yes.

Q. Well, how did you get the jury roll in the first place? I mean, is this in a meeting where you get through the roll of names and make decisions? A. That is right.

Q. How did that come about? A. From the list.

Q. You gave them a list? A. That is right.

Q. And what did you physically present that day? A. The list that you have there.

Q. Plaintiff's Exhibit Number 1? A. Mr. Gray had a list that he brought, I believe, and Mr. Morrow had some names written down. Melvin, I don't think you did, but I am not sure. [47] He had just gone on.

Q. Can we save some time? Your answer is no, Mr. Durette?

Mr. Durette: No. I didn't have a list.

A. And we had the jury list and the phone book.

Q. The previous jury list? A. No. The poll list, the voting list. I don't mean the jury list, I meant the poll list.

Q. All right. Now, do you have copies of any papers that were submitted by Mr. Gray or Mr. Morrow? A. No. I think Albert had his in a notebook in his pocket.

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Mr. Gray: I had it on a bill sent me, and I threw it away.

A. Mr. Morrow had it on something he had. After they added theirs on the list—

Q. Can I save a little time in that?

Mr. Banks: Like a three ring circus?

Mr. Jelinek: To some extent.

Mr. Banks: If you don't mind confusing the record.

【48】 Mr. Jelinek: Would you mind swearing them in?

(Whereupon, Mr. Gray and Mr. Durette were duly sworn.)

By Mr. Jelinek:

Q. Mr. Gray, you submitted a list with names that you had acquired?

Mr. Gray: Yes. We have been all over the county from time to time hunting people that could be put in the jury box.

Q. Do you remember how many names you submitted?

Mr. Gray: Oh, I have no idea.

Q. Do you still have the list?

Mr. Gray: No. It could be in some of any junk down there, but I doubt it.

Q. If you find it, would you attach a Xerox to this record?

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Mr. Gray: Yes, but I couldn't go through all of my things hunting something like that.

Q. All right.

Mr. Gray: I might say since it is pertaining to the question that you asked, one of you all's hand-picked leaders of the movement in the county, I personally contacted him and asked him to give me [49] whether or not in his opinion—not opinion, but his judgment would be qualified to go into the jury box and explained the whole details to him.

As a matter of fact, I waited a couple of days and come back the second time. The second time he turned up about two names which he didn't write down. I asked him to write them down, but he didn't do it. That is a fact in the case. Your all's hand-picked man in Forkland.

Mr. Banks: State the name, Albert. State the name of the handpicked man.

Mr. Gray: Well, I had rather not do it, Ralph.

Mr. Banks: Just put it in the record.

Mr. Gray: I prefer not to state the man's name.

Mr. Banks: I think you ought to tell him who you contacted.

Mr. Gray: We were born and raised with these people and we have done all we know how and treated them right. I feel Mr. Bokulich over here can get a fair trial with what is already in there. To me, this is a very ridiculous thing to come about [50] in the first place, which I guess is legal, I don't know. I think it is jeopardizing my civil rights and my personal position to call any names on this.

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Mr. Banks: You mean to mention the name?

Mr. Gray: What?

Mr. Banks: You mean to mention the name?

Mr. Gray: Yes. I certainly do. It is quite possible that it would work hardship on me, and I don't think it is subject to place myself in a position of having hardship worked on me on account of this.

Q. Well, of course, you are and you will be required at some given point to identify him, but I don't want to go into that now.

Mr. Gray: We will do it when the time comes.

Q. It will come pretty soon. Right now I just want the number. Do you recall the number of people?

Mr. Gray: No; I don't know.

Q. Was it over 50?

Mr. Gray: I said I didn't recall the number.

Mr. Banks: Which number? Did you mean the number that the man gave him?

Q. No. The total number that was submitted to [51] the Jury Commission.

Mr. Gray: You mean the total number considered, what we—

Q. No. The total number you yourself brought in to add to the list.

Mr. Gray: No; I don't know.

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Q. Was it over a thousand?

Mr. Gray: I have already answered your question.

Q. Well, I am sure you remember if it was over a thousand?

Mr. Gray: I don't remember.

Q. You can't remember whether it was between 50 and 1000 names?

Mr. Gray: No. I don't know what it was.

Q. Do you remember, Mrs. Yarborough, roughly how many names Mr. Gray submitted? A. I don't remember. There were a good many. Certainly not a thousand, but—

Q. Less than a hundred? A. I don't know.

Q. Okay. Do you remember, Mr. Durette, how many names?

[52] Mr. Durette: No, sir.

Q. But you remember that you submitted none, that is right?

Mr. Durette: Beg your pardon?

Q. You remember that you submitted none?

Mr. Durette: That is right, sir.

Q. Right.

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Mr. Gray: Let's go into why. Would you like to do that?

Mr. Jelinek: What?

Mr. Gray: Would you like to know why?

Mr. Jelinek: No. I am going to examine you and we will go into great length. This is just to fill in here.

Does anybody remember Mr. Morrow, how many he submitted?

Miss Yarborough: He had a number of names written down, and if Albert didn't have the little notebook, he had it. Somebody had a notebook with the names written down on it, but they were from people in his section of the county. Some were Negroes and some were white.

Q. Did you have any discussion about who was eligible?

[53] A. Names that the Commission members themselves brought in, there was no discussion on. There was discussion on the poll list.

Q. Newly registered people? A. Yes. There were people on there that nobody knew.

Q. Did you check—I am sorry. A. People that wasn't on there and that were thought to be all right were added to the roll.

Q. Did you check conviction records? A. Where there was any question of convictions, I did. Sometimes names ring a bell, and you are pretty sure there has been. Maybe you look it up and it wasn't that name—

Q. Yes. A. —it was something that was similar to it, but where there was any question of conviction, we did check. I did check. I usually do that before the Commission comes with the voting list.

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Q. Right. To go back to a question, did you go out to the precincts on the average of once for the purpose to get the names? A. Well, I want to some of them once and some of them [54] probably more, but no, I don't guess I did go more than once to each precinct for the specific purpose of getting names.

Q. Right. How much time would you say you spent on those dates when you went to the precinct? A. Well, I usually went during an off time, I mean, when I wasn't so busy. I couldn't give you any idea of it.

Q. Full day, half day? A. No. Just when I could take a little time out from the office—

Q. Okay. A. —or maybe a Thursday afternoon where you have the afternoon off and I could get out and go.

Q. Right. So after you had this meeting or during the meeting, you then got your jury— A. Roll.

Q. —roll together? A. That is right.

Q. And that is written down as one list? A. And the jury box filled.

Q. Somebody typed the cards up, right? A. Yes.

[55] Q. Did you yourself reject anyone that day? A. No.

Q. Did any member of the jury commission reject names from any of the lists? A. I can't remember whether all of them—whether everybody was put in the box or whether they weren't. I am sure there was some on the poll list that were rejected probably, because I don't think you would have that many names and not come across some that were undesirable, but specifically I do not remember.

Q. You can't be convicted of—there are certain crimes that you must not be convicted of to be on the voting polls also, is that right? A. That is right. Some people have had—what do you call it when you get reinstated?

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Q. That is a kind of a parole or pardon, declared eligible and returned to citizenship and all of that. A. But if you would be convicted of a felony, there would be some people that would not be added.

Q. In other words, if someone is paroled or whatever the procedure is to return to citizenship [56] and they are allowed to register to vote, they still would not be qualified to serve on the jury? A. It could be according to their character. I felt sorry for an old Negro that was convicted for distilling about 30 years ago and he wanted to get his rights restored because they were going to kick him out of his church and he would not be a deacon any more if he didn't. He had never voted in his life and he didn't want to vote, and yet he had to do it.

He had not been in any trouble for 30 years and I am sure deserved the right to vote.

Q. But it isn't automatic though, the fact that someone is on the jury list, you still want to look through? A. That old Negro would have had the character to go on a jury, but he couldn't read or write.

Q. Well, does that disqualify someone?

Mr. Banks: I am going to object to that question as calling for a legal opinion.

Mr. Jelinek: All right. Will you accept someone on the jury who is illiterate?

Mr. Banks: I object to it. It is a legal [57] opinion.

A. There probably are people on there that can't read or write, I don't know.

Deposition of Mary C. Yarborough

By Mr. Jelinek:

Q. But you wouldn't disqualify some one just because they can't read or write? A. I don't have anything to do with qualifying or disqualifying them.

Q. Well, as far as crossing them off the list? A. I don't know about most of the people that are there.

Q. Right. Okay. A. It is not my decision.

Q. So, then you had your jury roll and your jury box? A. Yes.

Q. And this ends the job of the Jury Commission, is that right? A. That is right.

Q. And then they start preparations for the next year? A. That is right.

Q. Does someone then present this box to the Judge or whoever it goes to?

[58] What is the next step after the jury box is compiled as far as the choosing of names to the jury list? A. The jury box is locked and kept, I believe—

Q. And kept in whose custody? A. It is kept in a safe in the Judge of Probate's office.

Q. And is there a time when someone chooses names from the jury box to make the jury list? A. Yes.

Q. And who does that? A. Judge Hilldreth.

Q. And does he do this in open court? A. He does it in my office.

Q. In your presence? A. Yes.

Q. And is this a regular wooden box? A. No. It is a metal box.

Q. A metal box which has index cards? A. No. It just has jury cards.

Q. I mean, in what shape are the cards? You don't happen to have one handy, do you? A. Ralph, see if there is—

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[59] Mr. Gray: Just a card with their name on it, so it appears.

A. Is there a card in there?

Mr. Banks: Yes.

A. This is a jury card.

Mr. Jelinek: I see. Can I have one marked for identification?

Mr. Banks: You can have one or a dozen. If you want a dozen we will give you a dozen.

(Whereupon, said card was received and marked for identification as Plaintiff's Exhibit 7 to the deposition of Mary C. Yarborough.)

By Mr. Jelinek:

Q. This card is kept in a metal box? A. That is right.

Q. And how does the Judge choose them? A. He draws them out.

Q. How are they kept in the box, in alphabetical order? A. No. They are dumped and shuffled up.

Q. And he picks out— A. He draws until he gets the number he needs for—well, he draws first for grand jury and civil court week, and for criminal court week, and draws **[60]** as many as he thinks he needs. He usually draws about 60 for the grand jury and civil courts, and usually about 50 for criminal.

Q. Now, the last time that this was drawn was when, roughly? A. I don't remember.

Q. Roughly? A. Oh, a few weeks before the grand jury met.

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Q. All right. The Judge draws two sets meaning 115 some odd number? A. Yes. It would be just about that number. I am giving you rough figures, approximately.

Q. And you said that one batch is for the grand jury? A. One batch with about 65 names is for the grand jury.

Q. And the other makes up the civil and criminal week? A. No. Your civil week comes with the grand jury week. That is why we draw more cards. After you have taken 18 people for the grand jury, then you need enough names to strike for trying your civil cases.

[61] Q. And then after that, at the same time, the Judge chooses some 50 odd for the criminal jury? A. He draws some 50.

Q. And then from that you make up two jury lists? A. Venires, that is right.

Q. And now, is—I have always had trouble with this, is the venire the 65 names and the 50 names, is that what you call the venire? A. That is right.

Q. Now, what happens with these names? A. Well, these names are taken—I mean, after I have typed up these cards, the Judge puts 65 in one envelope and writes on it for the first week of court, and 50 in another for the second week of court.

Then, I take these cards, put them in order by precinct and by occupations, because that way you can ditto a little bit easier, and type up a venire that can be used.

Well, I give one to the sheriff for him to issue a notice to the people who have been selected as [62] jurors, and he makes his return on that as to whether or not the law found the people at that time. If some were not, then they are listed on it.

Then, I take the cards upstairs with me when I go up to court. The sheriff calls the roll of jurors from his venire,

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and I pull the cards as he calls them. Each person answers present when his name is called.

Then, these names, if there are any people who are absent or excused, those cards are removed.

Q. No. I am sorry. Let's stop here for a moment— A. All right.

Q. —once we get to the excused.

Now, how are people excused? A. Well, the Judge usually excuses them if there is illness in the family or if something pressing has come up, if there are no capital cases.

If there are capital cases, then actual illness would be the only excuse.

Q. Now, there are certain exempted professions, are there not? A. Yes; there are.

[63] Q. And are those determined by the Jury Commission or is that determined for the first time at the Court by the Court? A. It is determined by the Jury Commission.

Q. So when the Jury Commission is going through the names, they will then take out those who are exempt, am I right? A. Well, not necessarily. Sometimes you contact people that are in a profession that would be excused and asked if they would like to serve as jurors.

If they would, you put their names in the box. If not, you don't.

Q. I believe that post office employees can be excused, can't they? A. Well, they used to be.

Mr. Banks: Postmasters.

A. Postmasters, and school teachers. It is the same thing, they can be excused.

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Q. That is right. A. Yet we have a number of school teachers that do serve. The same thing applies to superintendent of education.

Mr. Banks: This is off the record.

[64] (Off the record discussion.)

By Mr. Jelinek:

Q. Now, there is a list of those who are exempt that you refer to in the statute, is that right? A. Yes. I can't tell you who all of them are right now. I would have to look at the code to see.

Q. Right. Initially the Jury Commission rejects those who are exempt unless they themselves choose to sit, is that right? A. Well, I don't know that you would necessarily say they were rejected unless they chose—well, yes. I mean, if they do not choose to sit, then you do not require them to as you would in another occupation.

Q. Do you recall Negroes who were rejected by virtue of being exempt under the statute? A. Not that I recall.

Q. As far as you know— A. We have a number of Negro schoolteachers who are on the jury.

Q. And they have consented to such? A. Yes; they have.

[65] Q. As far as you know, the exempt provision of the statute hasn't had any effect of limiting Negroes? A. No. It hasn't.

Q. Now, would it be a fair statement that of the professions on the exempt list—I will show you this now—that the only one which effects Negroes are the school teachers in this county? A. Wait a minute and let me read it.

Q. Section C. A. Engineers and firemen, dispatchers of trucks. I don't know about train dispatchers and tele-

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phone operators. I would say that is probably just about all that would be in this area.

Q. For the most part? A. Yes.

Q. And as far as you know, no school teacher has actually been rejected from a jury for actually being a school teacher? A. No. In fact, a lot of them have been put on because they were.

Q. Now, we are back in court and the Judge is starting to excuse those who wish to be excused that come under the various provisions. [66] A. That is right. If you are over 65 and you asked to be excused—some people do, and they are paid and dismissed. Some people who are over 65, a few don't mind serving, and they continue to serve.

Q. Now, in 1966 were any Negroes excused by the Court from sitting? A. Well, we haven't—let's see. That would be last spring and this spring. I don't think so. I don't remember any asking about being exempt. I just do not remember.

Q. Okay. A. As far as I know, they all served, but I don't remember.

Q. And now, after this portion where the Court takes excuses, those that remain are then the—what do you call that, the final venire? A. Wait a minute now. You are going back to the cards that I have left?

Q. Right. A. I have pulled the cards that are exempt or excused or whatever you want to call it. Then, I take the cards that are left—

Mr. Banks: You know, I think we are getting [67] a little bit off course here. What she is doing is stating what the various official duties are according to law.

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Q. Just what she sees happening. A. Well, the Judge draws it from the hat in open court.

Q. From those that are left? A. Yes, sir.

Q. And he draws a grand jury? A. 18 for the grand jury and 12 each for jury number one, number two, and number three until they are all drawn. He draws them and swears them in.

Q. And a week or so later he does the same thing for the criminal jury? A. That is right.

Q. Now, in 1966 how many terms of court did you have? A. We have had three.

Q. And when do they sit? A. When? Well, we had court in March and in April and in September.

Q. Now, each time you have the grand jury? [68] A. Well, now, we have a grand jury twice a year.

Q. Oh, you have it twice a year? A. Yes.

Q. Which two of those, September and which other? A. September and March.

Q. All right. All three terms of court you have a jury in civil panels? A. Yes.

Q. Civil and criminal panels? A. Well, your grand jury and civil jury are together.

Q. Right. A. Your criminal week follows two weeks later usually.

Q. Now, let me ask you this: Each time you have your panels, do you provide the same names for the Judge to pick—I withdraw that.

The Judge sits in this room with you and picks a certain number of names for the initial jury list? A. That is right.

Q. Does he get all the names each time or do you [69] reject those who have been chosen in March for instance

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to sit in April? A. No. You see, in—wait a minute. In the fall, your jury box is full.

So, you check your list that you had in the spring, and if you know somebody has served on the jury before, then you drop him back in and wait until the next spring, I guess.

No, you don't either, because we pulled—

Mr. Banks: He stayed out of the box.

A. They stay out of the box.

Mr. Banks: They were placed in the next year.

A. From one term of court until the next, and then the Jury Commission puts them back in.

Q. So, in other words, for the March and April and September terms—well, to put it another way, those that are chosen in March are not part of the box that the Judge chooses in April? A. That is right, because they would be out.

Q. And when it comes September, those that were chosen in March and April are not in the box? A. Are not in the box because they are out.

Q. Has this been the policy so long as you have been [70] on the Jury Commission? A. As long as I have been on the Jury Commission.

Q. Haven't you had occasion for one man—was it Mr. Humphries who was jury foreman so many successive terms? A. I don't really think he was. I think it might have been years that his name—I mean, a lot of names come up every year, not necessarily the same man's.

Mr. Humphries just happened to be—to get his name where the Judge pulled it.

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Q. But it wasn't the same year? A. I don't believe it would have been during the same year.

Q. I see. Then, of course, going back to the succession, the next step is for the lawyers to excuse those— A. Well, no. The lawyers strike when they try.

Q. Strike then. A. Sometimes they just accept jury number one or jury number two and go on from there.

Q. Right. Now, do you then make a record of those? Do you certify to the court—well, do you [71] certify to the jury commission the names of all persons who have been found by the court to be disqualified or exempt? A. Yes. I mean, if a name is in the jury box for instance and this man is called to court as a juror and he says he is over 65, then I write on his card, "Over 65".

When the Jury Commission meets again, we pull that card and take his name off the jury roll.

Q. And you had no Negroes in that category in 1966 so far as you know? A. Mr. Jelinek, I frankly don't remember who we had in that category in 1966.

Q. All right. Do you make a record for the Jury Commission of those who are impanelled? A. No.

Q. Are you acquainted with Section 27 which required that? A. I guess I am not. Well, the Code has always been just confusing as the devil, and I don't know much more after reading it than I did before.

Q. I think we will all agree with that. A. Section 27.

[72] Mr. Banks: This is off the record.
(Off the record discussion.)

A. Does this mean that I am supposed to give the Jury Commission a copy of the venire? Is that what it is talking about?

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Mr. Banks: No. It says you are supposed to note opposite of the name the date they are impanelled. You don't do that.

A. I am sorry. I didn't know I was supposed to.

Mr. Banks: That doesn't have any bearing on this thing.

Mr. Jelinek: Okay. Well, I think—off the record.

(Off the record discussion.)

Mr. Jelinek: Let me make this statement, and I will ask you to consent that for 1963 there were approximately 377 names of citizens of Greene County in the jury roll and in the jury box of which 28 were Negro; in 1962 there were approximately—

Mr. Banks: Do you have the wording of that decree with you?

Mr. Jelinek: Pardon me?

【73】 Mr. Banks: Do you have the wording of that decree?

Mr. Jelinek: Yes; I do.

Mr. Banks: Let's just use the precise wording of Judge Grooms' decree.

Let me read this in the record. "According to the best information available, there were on the roll and in the box for 1961 353—"

Mr. Jelinek: Are you reading this into the record?

Mr. Banks: Yes. "—the names of whom 16 were known to be Negroes. For 1962 of the 374 on the roll, 26 were identified as Negroes. For 1963, 377 on the roll, 28 were identified as Negroes."

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Mr. Jelinek: Right. Will you accept those findings as correct?

Mr. Banks: I accept them as they are written.

Mr. Jelinek: Right. For the purpose of this case?

Mr. Banks: I am not saying that they are correct.

Mr. Jelinek: Well—off the record.

(Off the record discussion.)

[74] Mr. Jelinek: In other words, you will accept the statement that as Judge Grooms found these figures, they were so identified?

Mr. Banks: I will state that the wording of Judge Grooms'—

Mr. Bradley: You have got the exact number of each on the roll according to the best information available. They were rolled in the box, these names, and that is what we will stipulate to. That is a finding of fact of the Court.

Mr. Jelinek: Will you stipulate that it is the best information available?

Mr. Banks: We will stipulate that Judge Grooms found that in the language he used.

Mr. Jelinek: And that is presently the best information available that you have?

Mr. Banks: We will stipulate that Judge Grooms found that—

Mr. Bradley: —to be the number on the jury roll in Greene County during those years,—

Mr. Banks: —and that they are identified—

Mr. Bradley: —as being white and colored.

Mr. Banks: In other words, we are not saying [75] that this is the exact number.

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Mr. Bradley: He didn't say that.

Mr. Banks: He didn't say that.

Mr. Bradley: The evidence did not reveal the exact number.

The Deponent: And furthermore—

Mr. Jelinek: Let me put it another way. Would you stipulate that if I went through the same questions that Mr. Billingsley went through at trial, that the answers would be the same?

Mr. Banks: I will stipulate that Judge Grooms or whoever ruled would say the same thing that was said in that decree.

Mr. Jelinek: I will have to go—off the record now.

(Off the record discussion.)

Mr. Banks: I am going to back up about a sentence and do it this way: "The jury records do not reveal the number of whites or non-whites on the jury roll. The evidence did not reveal the exact number of each on the roll. According to the best information available, there were on the roll and in the box for 1961, 353 names of whom 16 were known [76] to be Negroes; for 1962, of the 374 on the roll, 26 were identified as Negroes; for 1963 of 377 on the roll, 28 were identified as Negroes.

Mr. Jelinek: And you will stipulate that if we asked the same people the same questions the answers would be the same?

Mr. Banks: Whatever answers they gave would be the same and the finding of the Court would be in the precise language as used in this particular case.

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Mr. Jelinek: Okay. I think we can take a break now and then resume with the records themselves.

(Whereupon, the proceedings were in recess from 11:40 until 12:00 Noon, whereupon, the following occurred:)

Mr. Jelinek: Is it correct that a person chosen in March cannot then be chosen to sit in April?

Mr. Banks: That is right.

Mr. Jelinek: But they can be chosen to sit in August?

Mr. Banks: In October or September of the same year.

[77] Mr. Jelinek: Right.

Mr. Banks: It is possible. It is mechanically possible.

The Deponent: It has happened.

By Mr. Jelinek:

Q. Right. I think there is one question I didn't ask you, or maybe I did, but did you consult any Negro organizations in compiling your names, the names, of any Negro fraternity? A. No. We don't in the white ones either.

Q. All right. Okay. Now, pursuant to the notice, would you produce the jury roll, jury box, and jury list for 1966?

A. Is it permissible to do that?

Mr. Banks: Yes. The jury box is locked up.

A. Well, we can't do the jury box. Well, the jury roll and the jury box are identical. The jury roll and list of jurors, 1966. I could give you what you want.

Q. For the three terms? A. Yes.

Q. Could we do so? A. Here is the jury roll at least. I may have to **[78]** go get that. That is the petit jury.

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I don't have a date on this. Was this the first week of criminal?

Well, here are my jury cards.

Mr. Banks: This is the jury list or venire that is not used.

Mr. Jelinek: Not used?

Mr. Banks: This is the criminal jury.

Mr. Jelinek: You stopped the jury?

Mr. Banks: No. We put criminal—

Mr. Jelinek: You indicted, but you didn't sit?

Mr. Banks: We had arraignment.

The Deponent: I will tell you, I would have to type you a copy of that venire from these jury cards. Wait a minute. This may be it. I believe this was it.

Mr. Jelinek: Off the record.

(Off the record discussion.)

The Deponent: Mr. Jelinek, I can type these and mail them to you, because evidently I do not have a copy of this venire. I gave you one.

Mr. Jelinek: Right.

The Deponent: You still have it?

[79] Mr. Jelinek: That is the—

The Deponent: That is the venire.

Mr. Jelinek: Is that the civil?

The Deponent: Civil and grand jury.

Mr. Jelinek: Right.

The Deponent: This is the next one.

Mr. Jelinek: That is the jury venire, right. Now, here is the jury roll.

Mr. Banks: Yes.

The Deponent: That's right.

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Mr. Jelinek: Now, what about the spring terms?

Mr. Banks: Of what?

The Deponent: I believe this may be it. These must be from the last court.

Mr. Jelinek: How does this work?

The Deponent: It is in alphabetical order.

Mr. Jelinek: And you make one up every year?

The Deponent: Yes.

By Mr. Jelinek:

Q. You make it every August? A. Yes, sir.

Q. Are they numbered? A. Yes. The rolls are numbered. Roll 39, Roll 48, [80] no number on that one.

Q. What does that mean, Roll 49 and Roll 50? A. That is the number of the roll. You see, it is, I guess, 50 years ago.

Q. Oh, I see. Each time you have a new name, I see.

Mr. Bokulich: You would have several rolls. A. No. You don't have but this one roll.

Q. So the last number is this year's? A. September. Now, that you have left, you take—

Mr. Bokulich: Several of the last would be for this year, is that right?

A. This is your roll number 50. You take your A's and your B's—

Mr. Banks: There are all the B's.

The Deponent: There are all the B's. Here is Forkland, the B's for that precinct.

Deposition of Mary C. Yarborough

Mr. Jelinek: Yes.

Mr. Bokulich: This is an annual job?

The Deponent: That is right.

Mr. Bokulich: Not per quarterly?

The Deponent: Not per quarterly. This is what
[81] the Jury Commission does each August.

By Mr. Jelinek:

Q. Would you repeat the names? A. Yes. Then you take off names.

Q. Do you keep a total somewhere like how many you would have for this year?

Mr. Banks: You saw that. That is in that certificate you had. You have already saw that.

Q. I see. Do you have one of these for 1965 and '64?

Mr. Banks: Yes.

Mr. Durette: There is one for '65. I don't know whether there is one before that or not.

A. Here is the list that Beasley gave me.

Mr. Jelinek: Here is the list submitted by Mr. Beasley which I will ask to be marked and Xeroxed.

(Whereupon, said list was received and marked for identification as Plaintiff's Exhibit 8 to the deposition of Mary C. Yarborough.)

By Mr. Jelinek:

Q. You don't have— A. There is no written list.

Q. You don't have a written list of those 400 odd names?

Mr. Banks: Yes. It is in that book.

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[82] A. I mean on one piece of paper. What he is talking about is one piece of paper.

Mr. Banks: Oh, no.

Mr. Jelinek: I would like to mark these two. Do you have any names on these? Here are some more names submitted by Mr. Spencer and here are some names submitted by Mr. Brown, Richie Brown. Would you mark these, please.

(Whereupon, said lists were received and marked for identification as Plaintiff's Exhibits 9 and 10 to the deposition of Mary C. Yarborough.)

Mr. Jelinek: And these.

(Whereupon, said lists were received and marked for identification as Plaintiff's Exhibits 11 and 12 to the deposition of Mary C. Yarborough.)

Mr. Jelinek: And here is the jury venire for the fall of '66. Would you mark this, please.

(Whereupon, said venire was received and marked for identification as Plaintiff's Exhibit 13 to the deposition of Mary C. Yarborough.)

By Mr. Jelinek:

Q. We were looking for the jury lists for the spring term, for the March and April terms. A. I think those were what I had there. It seems **[83]** to me that I typed that up, because somebody told me I was going to need them. I am pretty sure those are right.

Deposition of Mary C. Yarborough

Q. There is no date on this.

Mr. Banks: No.

A. No; but I am just about sure. Ralph, checked the names on that against all juror certificates.

Mr. Banks: Give me one of those.

A. Please don't lose my jury cards out of there.

Mr. Banks: Yes, ma'am.

A. Why don't we let Ralph check those. Here is one from the spring of '66.

Q. Do you know which one this is? A. Wait a minute, Ralph, you have got to give him this one because it shows occupation.

Mr. Banks: This is not a suit about occupations.

A. Well, I know it, but I thought they could tell more about it.

Mr. Bradley: They just want to know the racial makeup.

By Mr. Jelinek:

Q. Would you like to write that in there? A. Give me something to write with.

[84] Q. You can date it. A. I don't know what date it was.

Q. I mean, what date it was written, today. A. And date this up here?

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Q. Yes, ma'am. Today is the— A. 11/10.

Q. Right. Do you know which of the spring venires this is? A. That is the grand jury. I can tell by the number of people.

Q. I see. Do you have a civil one? A. Yes, but it is in a record book that I can't take out. This is the grand jury and civil right there.

Q. Let's just start and see what we have.

Now, you presented today certificates indicating there were 471 names on the jury roll and jury box in 1966? A. Yes.

Q. And that included the three terms. That was for the three terms of court? A. Two terms of court. We only have two terms.

Mr. Banks: No. Off the record again.

[85] (Off the record discussion.)

By Mr. Jelinek:

Q. I see. This will include the ones that just sat in September? A. Yes.

Q. And it will be for the next—for the ones that will sit in March and April? A. That is right.

Q. And then the '65 one, which had 429 names, that would be for the September '65 and the two past spring terms? A. That is right.

Q. And the same for the year before, 1964, when there were 399 names? A. Yes; it would be.

Q. Now for the 1966 list, you had two venires or two terms—well, no, two venires. You have given me a copy of the—

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Mr. Banks: Wait. I think she testified that there was one venire for '66.

Mr. Jelinek: Well—

Mr. Banks: You are thinking about the calendar year 1966.

Mr. Jelinek: There were two venires. Off [86] the record now.

(Off the record discussion.)

By Mr. Jelinek:

Q. Plaintiff's Exhibit 13 is the criminal venire, the one that they didn't actually set. A. Yes. That is a criminal venire that will come up in October—in November, or whenever it comes up.

Q. Right. Now, did— A. Now, I can't give you the civil and grand jury one, because Mr. Euclid and them came in here and took the last copy I had. It is going to have to be redone unless you can find them. I think I sent you one with somebody and then you came back with somebody else and got another one.

Mr. Euclid: We received—

A. You have two copies of that, so you don't need mine.

By Mr. Jelinek:

Q. At any rate, for the criminal term, the criminal venire, they actually sat on a certain day, is that right, I mean, they actually walked into the courtroom? A. On the days they were summoned, yes.

[87] Q. Right. Were you present that day? A. Yes.

Q. And can you tell me how many Negroes were present? A. No. I don't have any idea.

Deposition of Mary C. Yarborough

Mr. Banks: Let's be specific. When you say criminal venire, state which one you are referring to. We have two a year—

Mr. Jelinek: Two a year?

Mr. Banks: —ordinarily.

The Deponent: I couldn't tell you how many Negroes there were.

Mr. Banks: I am talking about the particular term.

Mr. Jelinek: You don't mean two a year?

Mr. Banks: Ordinarily two a year. This year we have had one.

Mr. Jelinek: Off the record.

(Off the record discussion.)

By Mr. Jelinek:

Q. There are two terms of court? A. Right.

Q. One March and April and the other September and October? [88] A. Right.

Q. What you have given me now is the criminal venire for the fall term, that is what this is? A. This is what that is.

Mr. Banks: State what year, please.

Q. For 1966? A. That is right. That one has not been in session yet.

Q. Right. You don't know how many Negroes were on that venire? A. No. It has been a good while since I typed it, and I don't remember.

Mr. Jelinek: Off the record.

(Off the record discussion.)

Deposition of Mary C. Yarborough

By Mr. Jelinek:

Q. Well, will you make an unofficial statement for the record as to the best of your knowledge?

Mr. Banks: All right. Let me see which one this is. I believe this was the—

The Deponent: You can tell by the number of people on it.

Mr. Banks: What?

The Deponent: You can tell by looking at the [89] number of people on it.

Mr. Banks: I can tell by looking at your book though quicker.

This is the term of court that met in March of '66. This list here, which is the grand jury and civil week of that term—

The Deponent: I will write that in.

Mr. Banks: It is my judgment there are 10 Negroes on that one. That is an unsworn statement, however.

Mr. Jelinek: Right. And on the—

Mr. Banks: On the other one, there were around 20 out of 50. That was the—

Mr. Jelinek: —criminal venire.

The Deponent: For—

Mr. Jelinek: For the fall term of 1966?

Mr. Banks: Fall term of '66.

Mr. Jelinek: Am I correct that at an earlier date that we agreed that of the grand jury and civil venire for the fall of 1966 there were 19 or 20 Negroes?

Mr. Banks: Yes. I don't remember the exact number, but there were around that on that jury, and

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[90] while we are making statements for the record, I tried a civil case in which a white man sued a corporation with five Negroes on the jury.

Mr. Jelinek: On the petit jury.

Mr. Banks: On the petit jury. They were on the actual jury that tried the case.

Mr. Jelinek: When was that?

Mr. Banks: That was the third Monday in September of this year.

By Mr. Jelinek:

Q. Now, do you have the venire list for the other terms of '66, for example, the criminal term? A. I will get it for you.

Q. Now, although I hate to put you to all this work— A. I am not going to do it this afternoon, if that is what you mean.

Mr. Jelinek: No; I don't. Off the record.

(Off the record discussion.)

Mr. Jelinek: That would be organization of court records that contains the lists of the venire for each term such as the copy which we marked as Plaintiff's Exhibit 13, is that right?

[91] Mr. Banks: (Nodding head affirmatively.)

Mr. Jelinek: Answer, "Yes" by Mr. Banks.

Now, what about the list of those who actually set?

The Deponent: There is no way I have to get those.

Mr. Banks: You can turn the machine off again.

(Off the record discussion.)

Deposition of Mary C. Yarborough

Mr. Jelinek: So there is no list that is kept?

The Deponent: No. There is not.

Mr. Banks: This is the grand jury for this past term of court, these cards.

Mr. Jelinek: How far back do you have these cards?

The Deponent: They go back in the jury box in August.

Mr. Jelinek: You only have from August on? In other words, you wouldn't have those cards except for this past August?

The Deponent: I don't have any except these cards.

[92] Mr. Jelinek: Right. I see.

Mr. Banks: Out of the 18 on the grand jury, 8—

Mr. Jelinek: Would you give those to Mr. Tribble to put in the record?

Mr. Banks: All right. These are the names of the Negroes. James W. Stinson—

Mr. Jelinek: Just give them to him so he can copy them.

Mr. Banks: —Curly Spencer, Sam Oliver, Jack Johnson, Herman Byrd, Jr., Lucas Scarbrough, Booker Cook, Glee Thompson, G-L-E-E.

Mr. Jelinek: I would like the white names.

Mr. Banks: What?

Mr. Jelinek: The white names.

Mr. Banks: The white men. Rasnell Jones, Chester Henderson, Raymond Cross, James Sterling, Jr., Richard McGalland, James Houston, Bob Findley, Douglas Taylor, E. B. Clayton, Paul Stokes.

Mr. Jelinek: Now, let me ask about—it is a quarter until one, do you want to run out—off the record.

(Off the record discussion.)

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[93] Mr. Jelinek: For the term that set in the spring of '66, do you recall how many Negroes set on the grand jury just roughly?

Mr. Banks: I can't recall how many of them.

Mr. Jelinek: Well, let's go back to this jury in the civil term. How many Negroes set on the petit jury?

Mr. Banks: One case—there were two civil cases in the civil term this fall. One case which I told you about that I tried there were five Negroes; and another case, there were three. In both cases, no Negroes were parties.

Mr. Jelinek: Yes, sir. What about in the spring of '66, did you have any Negroes on the petit jury?

The Deponent : You know, I don't think we tried any civil cases. It seems to me that we had a lot of them and everybody got together and settled just like this year. We thought we had a slough.

Mr. Jelinek: And the criminal?

Mr. Banks: The criminal cases, I can't recall whether any were tried. However, when there are criminal cases tried in the Circuit Court of Greene County, **[94]** I do the striking, and I do not strike a Negro because he is a Negro. I say that most criminal cases I try have Negroes on the jury including a case with a white man for assault with intent to murder.

Mr. Jelinek: That was this fall?

Mr. Banks: Fall of '65. We had at least three Negroes on that jury.

Mr. Jelinek: What about this last jury, say '66. Did you have any Negroes that set on the criminal jury or the criminal grand jury?

Deposition of Mary C. Yarborough

Mr. Banks: Fall of '66?

Mr. Jelinek: No. Spring of '66.

Mr. Banks: I can't recall offhand.

Mr. Jelinek: Okay.

Mr. Banks: But there were Negroes—

The Deponent: On the grand jury too.

Mr. Banks: —on the grand jury. That is what you are referring to.

The Deponent: Wait a minute. I can tell you what Negroes served on the grand jury. Where is my jury roll.

You want the grand jury spring of '66, is that right?

【95】 Mr. Jelinek: You have a list of the grand jury, right?

The Deponent: I can look on those books.

Mr. Jelinek: You have got the grand jury, but not the petit jury?

The Deponent: Well, I have got the petit jury. It is petty instead of petit.

It doesn't show what cases they served on. They were simply a part of the venire.

Mr. Jelinek: I see.

Mr. Durette: Doesn't he—

Mr. Jelinek: Off the record now.

(Off the record discussion.)

Mr. Banks: Let's name the names of the Negroes.

Mr. Jelinek: What are you doing now?

Mr. Banks: This is spring, 1966 grand jury.

Mr. Jelinek: I will take all the names.

Mr. Banks: Do you want to specify them?

Mr. Jelinek: Call off the names.

Deposition of Mary C. Yarborough

Mr. Banks: All right. J. E. Tremnem, W. H. Johnson, Jelson Smith, a Negro, Booker Cook, a Negro, W. M. Burleson, Joe L. Brown, Joe L. Sanders, [96] W. R. Britton, Frank Wallace, A. B. Hitt, E. A. Davis, Joe Grantham, Boyd Crawford, a Negro, Bennie Childress, a Negro, Nathinial Carrier, a Negro, Robert C. Carpenter, Houston McGraw, Glenn Porter; that is it. That should be 18.

Mr. Jelinek: How many Negroes were on that one?

Mr. Banks: All right. We have got five.

Mr. Jelinek: Now, what about '65?

Mr. Banks: Which term now?

Mr. Jelinek: Fall of '65. Do you want to call those off and identify them?

Mr. Banks: James Whitfield, H. L. Richardson, Woodrow Jacobs, N. L. Davenport, C. W. Drennen, C. M. Rogers, W. P. McLain, William H. Dixon; I don't know his race, J. L. Hollingsworth.

Mr. Jelinek: Would you write unknown on those?

Mr. Billingsley: Is there any way you can tell?

Mr. Banks: I notice him on the list. He lives in Forkland, but I don't know his race at all, [97] Orzell.

Tom Giles, a Negro, Homer Carpenter, Jr., Rosell Vellocket, a Negro, Frenchy Burden, a Negro, A. R. Church, Benny Lewis, Rossel Carver, a Negro, and a blank.

The Deponent: I don't know what happened to that.

Mr. Banks: One blank. Ernest Wilson. That is all.

Deposition of Mary C. Yarborough

Mr. Billingsley: Let me ask this. You say you would know the chairman of each petit jury?

Mr. Banks: No. You mean the foreman.

Mr. Billingsley: Yes.

Mr. Banks: No. I wouldn't know.

Mr. Billingsley: Well, wouldn't the verdict show?

Mr. Banks: The verdict would show it. That is getting to a tremendous undertaking.

Mr. Billingsley: That is not tremendous if you don't have any more cases than you say you have.

The Deponent: The foreman—

Mr. Billingsley: The foreman would remember—

[98] Mr. Jelinek: Off the record.

(Off the record discussion.)

Mr. Banks: This is the spring grand jury for the year 1965. J. P. Tidmore, Joe Eckles, John W. Sanders, A. W. Young, a Negro, Webster Cooker, N. L. Davenport, Glenn Porter, James Madison, John M. Spencer.

The Deponent: He is a Negro.

Mr. Banks: John Spencer?

Mr. Durette: No.

The Deponent: You are talking about Johnny.

Mr. Banks: Warren Coleson, J. F. McGhee, Archie Brown, a Negro, Alford Graham, a Negro, Owens, C. E. Carpenter, James J. Roebuck, R. E. Henderson, and Jack Montgomery.

Mr. Jelinek: That is spring of '65?

Mr. Banks: '65.

Mr. Jelinek: Now, fall of '64.

The Deponent: Mr. Jelinek, we haven't had any

Deposition of Mary C. Yarborough

lunch. Now, there isn't any sense in taking all these things.

Mr. Banks: Do you think this is necessary to go on back?

Mr. Jelinek: I really do. I hate to take your time like this, but I really do need it.

Mr. Banks: All right. This is the fall term, 1964. Alex Crawford a Negro, Nolan C. Hunt, J. W. Sterling, Jr., James Giles, Jr., a Negro, W. C. Beasley, John Sammice.

Mr. Bokulich: Excuse me. Beasley is a Negro.

Mr. Banks: I think this is a white man. John Sam Miles, S. C. Lancaster, Vernon R. May, J. T. Tate, Grayfield Hamilton, Shep Cook, a Negro.

Mr. Jelinek: And that was what?

Mr. Banks: That is fall of '64.

Mr. Jelinek: I think we will need only spring of '64.

Mr. Banks: I am glad to hear that.

Mr. Jelinek: We have the stipulation. Mrs. Yarborough, in the organization book here, you would have the civil list that included the grand jury, right?

The Deponent: That is right.

Mr. Jelinek: I see. But the names are all in there.

[100] The Deponent: Yes.

Mr. Banks: All right. This is the spring term grand jury, 1964.

N. L. Davenport, Rubin C. Green, H. O. Williams, Richard E. Owen, Alvis Richardson, Herman Norwood, Jr., a Negro, Albert Gray, James E. Banks, James S. Lamb, Tom Bains, Henderson Eatman,

Deposition of Mary C. Yarborough

W. M. Steel, Jr., John Wilson, T. R. Cathie, Jr., Julian Merchant. That is all I can find for the spring of '64.

Mr. Jelinek: That is all the names?

Mr. Banks: That is all that I see in there of the grand jurors.

Mr. Jelinek: Thank you.

It is correct, Mrs. Yarborough, that before '64 approximately the most Negroes ever was three or four on the grand jury and one or two on the petit jury? A. I don't remember, Mr. Jelinek. Probably.

By Mr. Jelinek:

Q. Now, to save a little time, the only thing more I would want in the record would be permission to have some people by hand copy— A. No. I will tell you right now I am not going [101] to have my office swarmed with people that don't know what they want. If somebody wants to bring a sheet in and do it in a short time, it will be all right, but otherwise it won't.

Mr. Jelinek: I mean, just that one person sitting at the desk.

The Deponent: No.

Mr. Banks: Why don't you come in and copy it, Don?

Mr. Jelinek: I am the most irreputable person you could get in here.

Mr. Banks: That is in the record.

Mr. Jelinek: Off the record.

(Off the record discussion.)

Deposition of Mary C. Yarborough

Mr. Jelinek: I guess, Mrs. Yarborough, we will just have to go to Birmingham.

Mr. Banks: She can't take this to Birmingham.

Mr. Jelinek: Well, she could by court order, but just to save all this time—I can ask the questions about the whole books. As much as it will cost, I will pay for it.

The Deponent: If you want me to have it done and pay someone, I will do that.

[102] Mr. Bradley: You haven't made a motion to photograph the records. All you have done is said you wanted to take a deposition and bring the records from which they can testify from, and that has been done.

Mr. Jelinek: I will ask the questions and we will name every name in the jury roll, you know, if that is what you want. I will ask you a question right now. With the use of the jury roll, will you give me the names of each person alphabetically from each precinct for each jury roll since the book has been compiled?

The Deponent: No; I will not.

Mr. Banks: I think that is an unreasonable question.

The Deponent: It would be an unreasonable question.

Mr. Jelinek: You think it is an unreasonable burden on you, Mrs. Yarborough?

The Deponent: Well, if it meets with Mr. Banks' and Mr. Bradley's approval.

Mr. Banks: Who are you going to have to copy them?

Deposition of Mary C. Yarborough

[103] The Deponent: I could have the people over at the Probate Office to photostat these and it would be at a time that would be suitable so as not to clutter my office up with people.

Mr. Banks: It would be a dollar a page for it. That is the regular charge.

The Deponent: It would be a dollar a page if you want to do that. I will be glad to have it done, but I cannot get my work done with people all under foot.

Mr. Jelinek: This is off the record now.

(Off the record discussion.)

Mr. Banks: Let me ask a question for the record. You are the Register for Greene County in Equity, are you not?

The Deponent: I am.

Mr. Banks: I will ask you if there is not pending in the Circuit Court in Equity of Greene County an injunction suit where Alabama Power Company has enjoined the International Brotherhood of Electrical Workers and the members thereof in connection with a strike by the employees of the I.E.W.?

[104] The Deponent: Yes, sir.

Mr. Banks: I will ask you if there are numerous petitions, I believe there have been five petitions to cite numerous individuals and local unions for contempt of court?

A. Yes, sir.

Mr. Banks: And these cases are still pending before the Circuit Court of Greene County, Alabama?

Deposition of Mary C. Yarborough

The Deponent: Yes, sir.

Mr. Banks: I will ask you whether or not there are not approximately 60 defendants that are involved in this proceeding?

The Deponent: At least.

Mr. Banks: And that your time has been devoted primarily to this?

The Deponent: It has.

Mr. Banks: That this is a statewide strike against the Alabama Power Company?

The Deponent: That is correct.

Mr. Banks: And that the Alabama Power Company furnishes electrical power for most of the State of Alabama and it is necessary that these proceedings be handled as smoothly as possible without [105] any disturbance or interruption?

The Deponent: That is right.

Mr. Banks: All right.

The Deponent: I don't want to be unreasonable about this, but I simply cannot do it.

Mr. Jelinek: Off the record now.

(Off the record discussion.)

Mr. Banks: Let's get on the record a minute. Actually this office of yours is used many times for trials of cases where there are—

The Deponent: It is constantly. More cases are tried in this office than upstairs.

Mr. Jelinek: Let me ask you this: Mr. Billingsley, these are public records, aren't they?

Mr. Banks: They are public records, except the jury roll is confidential by law.

Mr. Bradley: That is right, by statute.

Deposition of Mary C. Yarborough

Mr. Jelinek: What about your organization records?

Mr. Banks: Organization records are public records.

Mr. Jelinek: Let's start with that and somebody can take it in the next room.

[106] The Deponent: No. It is not going out to the next room. It is staying in here. You have your organization of the Court through your old case.

Mr. Jelinek: No. I need the names also.

The Deponent: I will have it done for you if you are willing to pay for it.

Mr. Banks: As I understand it now, the issue in this case is whether Paul Bokulich can get a fair trial, because you are alleging Negroes are now being excluded from the jury?

Mr. Jelinek: No. Far from it. We are alleging a systematic exclusion which means continuously, and we cite going back this period of time specifically.

Mr. Banks: Yes; but the actual meat of the coconut is the jury rolls as they are now constituted. Now, what has been done in the past—

Mr. Jelinek: Here is a case that Mr. Billingsley—take this all off the record.

(Off the record discussion.)

Mr. Jelinek: Now, we can have a photographer come in at the time Mrs. Yarborough is available, and anything that—he will Xerox the entire jury roll, [107] photograph the entire jury roll. Is that agreeable?

Mr. Banks: That wouldn't take any time.

Deposition of Mary C. Yarborough

The Deponent: I wasn't trying to be unreasonable.

Mr. Jelinek: I think you may have a good point. I wouldn't want to sit here with somebody else listening, of course.

Now, the list of those that set on the grand juries, you have given me. Do I presume you have no list of those who are struck by counsel?

Mr. Banks: That is right. No record is kept other than what counsel keeps.

Mr. Jelinek: And you don't have the strike list either, copies of the strike list?

The Deponent: The strike list would be just like the other ones. Their names would be on the jury venire.

Mr. Jelinek: That is right.

Mr. Banks: You see, these strike lists are destroyed because they are confidential. You don't want to have a man know you strike him from a jury. If I had some, I wouldn't let you have them for that reason.

Mr. Jelinek: And you wouldn't have a list of **[108]** who set on the petit jury?

Mr. Banks: No; other than the foremen.

Mr. Jelinek: Now, what about the names and addresses of the foreman of these various grand juries through the verdict list?

Mr. Banks: You mean the grand jury foremen?

Mr. Jelinek: I should say the grand jury foremen.

The Deponent: There is no record of that.

Mr. Billingsley: I have a record of some of the foremen.

Mr. Banks: You can get those.

Deposition of Mary C. Yarborough

Mr. Jelinek: We have a grand jury list.

Mr. Billingsley: I am talking about the petit jury.

Mr. Jelinek: What about the foremen on the civil cases?

The Deponent: The only place would be in the Judge's minutes.

Mr. Banks: It would be in the minute book.

Mr. Jelinek: Where is the minute book? May I physically see one of those?

The Deponent: It would be in his bench notes, [109] not in his minutes.

Mr. Jelinek: I see. Where is the foreman here?

Mr. Banks: That was a plea of guilty. Here is one right here. Jury finds the defendant guilty of assault, and Robert A. Finch, Foreman.

Mr. Jelinek: Why don't you do just that? Why don't you hire someone whom we will pay to get the names of the foremen of the criminal and civil juries from 1956 to date.

The Deponent: 1956 to date.

Mr. Banks: What point are you trying to prove on the names of the foremen?

Mr. Jelinek: Mr. Billingsley brought up the fact that by having the names of the foremen, if they remember—

Mr. Banks: If he remembered who was on the jury.

Mr. Jelinek: Who was on that jury.

The Deponent: And you want civil too?

Mr. Jelinek: Yes. Civil too.

The Deponent: All right. You are going to pay for it?

Deposition of Mary C. Yarborough

[110] Mr. Bokulich: You are going back to '56 and asking for a recall on memory.

Mr. Jelinek: I know it. Those people don't sit on a jury every day. How much trouble is it to remember if you have Negroes on there or not?

The Deponent: All right. Now, you will agree to pay \$10.00 a day to whoever I hire to do that?

Mr. Jelinek: Right. Now, I think we have said you don't have a list of those who were challenged?

Mr. Banks: Stricken you mean?

Mr. Jelinek: Stricken.

Mr. Banks: By counsel?

Mr. Jelinek: Or by the Court.

Mr. Banks: No. The Court would say Mr. So and So is excused because he is overaged.

Mr. Jelinek: Yes. Do you know, Mrs. Yarborough, if the Court has exercised his judgment on those who would not consent to be stricken from sitting on a jury?

The Deponent: I don't know what you mean.

Mr. Jelinek: Under selection.

Mr. Banks: According to the Code, you can do **[111]** that. It has never been done.

Mr. Jelinek: He hasn't stricken anybody on his motion for reasons other than those?

The Deponent: No.

Mr. Jelinek: Is there any policy about striking ministers?

The Deponent: Ministers aren't in the jury box.

Mr. Jelinek: Why not? Are they exempt?

The Deponent: I don't know whether they are on that list of people or not, but I have never heard of a minister serving.

Deposition of Mary C. Yarborough

Mr. Bradley: Ministers are not exempt.

Mr. Banks: They are not exempt, but it is a policy that they are never put in a jury box.

The Deponent: We have never had any white or Negro ministers to serve on the jury.

Mr. Jelinek: Is there any other profession where that policy is followed?

Mr. Banks: Lawyers can claim exemption.

Mr. Jelinek: This is lawyers are not exempt, but—

The Deponent: I don't know about doctors, [112] but we don't use them. Doctors, lawyers, preachers.

Mr. Banks: National Guard, they are exempt, but they are put in the box anyway.

Mr. Jelinek: By their consent anyway?

Mr. Banks: One of them claimed an exemption one time when he had to get ready for inspection.

Mr. Jelinek: But anybody has a right to consent to go on though he is exempt?

Mr. Banks: Right.

Mr. Jelinek: Is there anybody who is not exempt who as a matter of policy is not put on the jury box like ministers?

Mr. Banks: Yes.

Mr. Jelinek: Who else?

Mr. Banks: People with questionable pasts where they have been involved in certain things. Now, I am telling you this—I want this off the record.

(Off the record discussion.)

Mr. Jelinek: Is there any other group who although they are not exempt are not put on the jury box but are excused or not put on the jury roll?

Deposition of Mary C. Yarborough

[113] Mr. Banks: I don't know of any. Do you, Melvin?

Mr. Durette: No, sir.

Mr. Jelinek: Do you know how many ministers there are in Greene County?

The Deponent: I have no idea.

Mr. Jelinek: Are there more Negro than white ministers?

The Deponent: I don't know that either. I would think so, but don't some of the churches use the same preacher, maybe one preach at one church one Sunday and some other—I don't know.

Mr. Jelinek: All right. I think that covers it. I think that is all for Mrs. Yarborough.

Just another minute.

The Deponent: All right.

Mr. Banks: Let me ask Mrs. Yarborough just a few questions. Is that all right with you, Bob?

Mr. Bradley: Yes.

Mr. Jelinek: Let me finish.

Mr. Banks: Oh, I thought you were through.

Mr. Jelinek: No. I may have something else.

[114] What about education? Is education a bar to being on a jury roll?

The Deponent: Not necessarily. I think it is native intelligence more than you would say formal education, because a number of people that are in the jury box, both white and colored, have very little formal education, but are sensible people as far as I know, or as far as the people that put them in there knew.

Mr. Jelinek: Now, what about illiteracy. Is that a bar?

Deposition of Mary C. Yarborough

The Deponent: Well, that would be strictly up to the jury commission. It would not be up to me.

Mr. Jelinek: All right. I will save that for the jury commission.

Now, I recall earlier in your testimony that you made some discussion about the crime rate in Greene County.

The Deponent: Yes.

Mr. Banks: I testified about that.

Mr. Jelinek: No. It was Mrs. Yarborough.

The Deponent: I did too, before.

[115] Mr. Jelinek: And you testified that of 325 felonies committed in the last 10 years, 12 were committed by white people?

The Deponent: Well, I don't remember the figures, but I know they had me look that up and I did.

Mr. Jelinek: Where did you look that up?

The Deponent: In the criminal convictions, just like that book you just looked at that you wanted to get the foreman of the juries out of.

Mr. Jelinek: I see. I guess we are going to have to get that same slow looker.

The Deponent: You want the same person to write that down for you?

Mr. Jelinek: Yes.

Mr. Banks: Now, I believe that was qualified as to residents. We have a good many transits going through here.

The Deponent: We didn't count those as Negroes either.

Mr. Banks: No.

Mr. Jelinek: No convictions of white and Negro transits.

Deposition of Mary C. Yarborough

Mr. Banks: It was just like that last term [116] of Court. We just had arraignment.

Mr. Jelinek: Yes.

Mr. Banks: We sent two people to the penitentiary, both of them were white, but they were transits.

Mr. Jelinek: I would want the Negroes who are residents of Greene County.

The Deponent: Negro or white. I don't know whether I could have somebody that could come in here and know it or not.

Mr. Jelinek: Know what?

Mr. Banks: Know the people.

Mr. Jelinek: All right.

The Deponent: Ralph and I did it before.

Mr. Jelinek: Why don't you make the total list and then we will have somebody look at it.

Mr. Banks: I don't think it would vary substantially from that figure then.

Mr. Jelinek: How about the names?

Mr. Banks: Names?

Mr. Jelinek: Yes.

Mr. Banks: I can't get them.

Mr. Jelinek: What?

[117] Mr. Banks: I don't know how you are going to get them—off the record.

(Off the record discussion.)

Mr. Jelinek: In other words, we can have that list compiled by your same person.

Mr. Banks: They won't know whether—

The Deponent: They will not know whether they are black or white.

Deposition of Mary C. Yarborough

Mr. Jelinek: They will list the name and date and address and conviction.

The Deponent: I don't have addresses. That I can't give you.

Mr. Jelinek: Name and date and conviction.

The Deponent: You will have to delete your transits.

Mr. Billingsley: The person that compiles it can do it on the basis that you did it before, for the State.

Mr. Banks: I believe that actually Mrs. Yarborough and I did that.

The Deponent: Mr. Banks and I worked together on that.

Mr. Banks: That took quite some time.

[118] The Deponent: It took a long time and we didn't have that Alabama Power Company mess.

Mr. Billingsley: Did you write it down?

Mr. Jelinek: Off the record.

(Off the record discussion.)

Mr. Jelinek: Let's go back on the record. The list that you gave previously did not include misdemeanors?

Mr. Banks: I didn't have—

Mr. Jelinek: I should say total list.

The Deponent: To my best judgment, that—

Mr. Jelinek: Did you include misdemeanors?

Mr. Banks: Certain misdemeanors.

Mr. Jelinek: Which ones didn't you?

Mr. Banks: Crimes involving moral turpitude. Those are misdemeanors that disqualify.

Mr. Jelinek: Would you name the crimes which don't disqualify?

Deposition of Mary C. Yarborough

Mr. Banks: Give me Title 14.

Mr. Jelinek: Assault and battery—

Mr. Banks: —on someone other than your wife does not disqualify you. I don't know Title 14. Crimes involving moral turpitude disqualify, vagrancy [119] disqualifies, wife beating disqualifies, and there are some others that right now I can't recall.

Mr. Jelinek: You were saying assault and battery not on a wife.

Mr. Banks: Yes.

Mr. Jelinek: Vagrancy. What else doesn't—assault and battery other than on your wife would not disqualify.

Mr. Banks: That would not be a disqualifying thing.

Mr. Jelinek: What else?

Mr. Banks: Crimes involving moral turpitude would.

Mr. Jelinek: So we will arrange for somebody to get the rest of the convictions also.

The Deponent: Yes. You want that to go back to '56?

Mr. Jelinek: Right. Let me see if that is all.

The Deponent: I think it must be.

Mr. Jelinek: Can you think of anything else?

Mr. Billingsley: No; I can't.

Mr. Jelinek: That is all. Thank you, Mrs. [120] Yarborough.

The Deponent: Good. Thank you.

FURTHER DEPONENT SAITH NOT

(Certificate Omitted in Printing)

Deposition of Albert Gray

[1]

(Title Omitted in Printing)

STIPULATION

IT IS STIPULATED AND AGREED by and between the parties through their respective counsel, that the deposition of ALBERT GRAY may be taken before Robin L. Tribble, Commissioner, Greene County Courthouse, Eutaw, Alabama, on the 10th day of November, 1966.

IT IS FURTHER STIPULATED AND AGREED that the signature to and the reading of the deposition by the witness is waived, the deposition to have the same force and effect as if full compliance had been had with all laws and rules of court relating to the taking of depositions.

IT IS FURTHER STIPULATED AND AGREED that it shall [2] not be necessary for any objections to be made by counsel to any questions, except as to form or leading questions, and that counsel for the parties may make objections and assign grounds at the time of the trial, or at the time said deposition is offered in evidence, or prior thereto.

IT IS FURTHER STIPULATED AND AGREED that Notice of filing of the deposition by the Commissioner is waived.

[3] . . .

Eutaw, Alabama
November 10, 1966.

BEFORE :

Robin L. Tribble, *Commissioner*.

APPEARANCES :

Messrs. Donald A. Jelinek, Attorney at Law, Lawyers Constitutional Defense Committee, 31½ Franklin Street, Selma, Alabama, and Orzell Billingsley, Jr., Attorney at

Deposition of Albert Gray

Law, Masonic Temple Building, 1630 4th Avenue North, Birmingham, Alabama, appearing for the Plaintiff.

Mr. Robert P. Bradley, Assistant Attorney General, State of Alabama, Montgomery, Alabama, and Mr. Ralph Banks, Jr., County Attorney for Greene County, Alabama, Eutaw, Alabama, appearing for the Defendants.

[4] I, Robin L. Tribble, a Court Reporter of Birmingham, Alabama, acting as Commissioner, certify that on this date, as provided by the Rules of Civil Procedure of the United States District Court, and the foregoing stipulation of counsel, there came before me at the Greene County Courthouse, Eutaw, Alabama, beginning at 1:30 P. M., Albert Gray, witness in the above cause, for oral examination, whereupon the following proceedings were had:

ALBERT GRAY, being first duly sworn, was examined and testified as follows:

Examination by Mr. Jelinek:

Q. Mr. Gray, you are a member of the Jury Commission?
A. I understand we are entitled to \$4.00 pay possibly plus mileage. Do you have that ready?

Mr. Banks: I overlooked that, Don. In behalf of Mrs. Yarborough, I make a request for that.

Mr. Jelinek: You understand that wrong. **[5]** This is not a subpoena. This is by notice of motion.

Mr. Banks: It is by agreement. It is by agreement, you are not entitled to that.

The Deponent: I am not entitled to anything?

Mr. Banks: Maybe we should have subpoenaed you. I forgot that.

Deposition of Albert Gray

The Deponent: Don't slip up and lose me money.
Now, you go ahead if you like.

By Mr. Jelinek:

Q. All right. Would you repeat my last question, please?

(Question read.)

A. Right.

Q. And when were you appointed? A. Oh, I have been on it three times. I would say this is '66, '65, '64—I don't know what time.

Q. Are you appointed each year at an annual appointment? A. Not to my knowledge. I think I was appointed and that has just been it. I don't think this is an every year affair. I don't think so.

Q. You are appointed for an indefinite period? A. Apparently so.

[6] Q. And you have just been appointed once? A. Yes.

Q. That is since 1963? A. Oh, yes. '64.

Q. And you were appointed by the Governor, is that right? A. I believe that is the one.

Mr. Banks: He is not a lawyer. His term runs with the Governor's term as I understand it.

A. Yes. I don't know what it is. I just got a paper that says you are on the Jury Commission.

Q. All right. Is the present Jury Commission the same people who were members from the beginning with you? A. No, sir.

Q. Who else is on? A. Mr. Fulton Durette was on it two years. I served with Mr. Fulton Durette and Walter Morrow for two years prior to this year.

Deposition of Albert Gray

Q. Mr. Durette is the Justice of the Peace, right? A. I don't know.

【7】 Q. Is he, Ralph?

Mr. Banks: Yes. The Justice of the Peace can hold more than one office if you are talking about constitutional violation.

Mr. Jelinek: Off the record.

(Off the record discussion.)

By Mr. Jelinek:

Q. All of these men were white men, am I correct?

Mr. Banks: Don't answer that question.

A. I don't know.

Q. Now, did you visit any precincts— A. Yes, sir.

Q. —for the August, 1966 meeting? A. I didn't quite follow you. Did you ask did I visit precincts from 1964 through '66, is that your question?

Q. No. Did you visit precincts for the 1966—from August, '65 until August, '66? A. Well, I don't quite follow you yet. Restate it one more time, please, sir.

Q. All right. In order, you met last in August, before this time, you met in August of '65 the last time? 【8】 A. You have got the figures. I don't have them here.

Q. From that time in August of '65 to August of '66, did you visit any precincts— A. Oh, yes.

Q. —to ascertain jurors? A. Yes, sir.

Q. Did you visit all the precincts? A. I wouldn't say I visited them all.

Q. All right. A. I am on the constant move and visiting all time, 365 days a year. I have a lot of contacts.

Deposition of Albert Gray

Q. Do you charge—do you receive payment for the days that you work on behalf of the Jury Commission? A. One day a year. In '66, that is what you are talking about?

Q. That is right. A. One day. \$10.00 I believe it was, something like that.

Q. And you didn't receive—are you aware that you are entitled to be paid for every day that you actually are engaged in the discharge of your [9] duties as a member of the Jury Commission? A. Well, more or less. I don't know whether I ought to explain the situation or not.

Should I, Ralph?

Mr. Banks: That is enough. Just answer it that way.

By Mr. Jelinek:

Q. That is about \$10.00 a day? A. One day, yes.

Q. But you are entitled to \$10.00 for every day that you work for the Jury Commission?

Mr. Banks: Except Sunday now.

Q. Except Sunday. A. To the best of my knowledge, it has been confined to one or two days ever since I have been on it, and I could get out here and go here and yonder and everywhere on the order of the Jury Commission and collect my pay. However, I do travel a lot and there is nothing wrong with picking up any information you can since you are already on the Commission.

Q. All right. But did you set aside any special days just to work for the Jury Commission? A. No.

[10] Q. And the other days you did it in the course of your regular business? A. That is right.

Deposition of Albert Gray

Q. All right. Now, in the course of getting this information for the Jury Commission, which of the eleven counties—the eleven precincts did you visit? A. Well, I couldn't specify. I go pretty well all over the county. Now, one part I hardly ever touch is back up in the northern part where Mr. Morrow is. He has been in there for years. I seldom ever go there, but all along the south.

Q. Which precincts would those be? A. Boligee, Forkland, Eutaw, Springville.

Q. Boligee, Forkland, Springville, yes. A. Eutaw.

Q. Eutaw. A. They don't have a—

Q. Any others? A. Boligee. Did I say Boligee?

Q. Yes. A. Well, that is pretty well the south part of the county.

[11] Q. Those are four precincts that you are the expert and go about getting names? A. I am not an expert in any precinct, but I do cover those.

Q. In Forkland, who do you speak to to obtain names? A. Well, I spoke to Beck down there.

Q. Is he white or Negro? A. He is colored.

Q. Anyone else? A. If you are going to find out any information about this situation, you have got to go to coloreds to find out, to see who is qualified. They are better qualified to answer who would be a good upstanding citizen and probably all right to go on the jury.

Q. Much more so— A. —than a white person.

Q. Certainly. A. Yes, sir.

Q. Do you think white people would be able to do it? A. Yes, sir.

[12] Q. But the best source is Negro? A. Yes. I had rather go to the Negro on it myself. They give you better information on it.

Q. Who else did you go to in Forkland? A. I have talked to different ones, but I don't recall their specific names.

Deposition of Albert Gray

Q. Did you get a list? A. I asked for a list.

Q. I mean, nobody brought out a list for you? A. Not down there for me. Now, we had access to all these lists.

Q. I understand. A. Some of them did come out of Forkland, but I personally didn't get them. I did have access to them.

Q. Did you pick up any names in Forkland? A. Yes. I picked up some.

Q. What about Boligee? A. We picked them up down there.

Q. Who did you speak to down there? A. I don't remember these peoples names. It is really a waste of time to ask me names. I can't remember names. I just know them as Bill or Jack [13] or John or something, and let them go at that.

Q. How many people did you speak to in Boligee? A. Not many.

Q. Two or three? A. Probably.

Q. Probably. Were they ministers or storekeepers? A. No. I would just say the mill run of country folks. I don't know what they do.

Q. What about Eutaw? A. Same situation.

Q. No names that you can remember offhand? A. Well, you have them on these lists. We have talked to some of them.

Q. Some of these lists that we have in evidence? A. Yes. That is Howard Brown. That is one I can recall offhand, and he is a prominent citizen. Anybody can recall him offhand.

Q. Right. How about Springville? A. And there, no. I don't recall the names out there. There is not hardly any Negroes out in Springville, I don't think.

Deposition of Albert Gray

Q. Did you speak to any Negroes in Springville [14] that you can think of? A. Not that I can think of, no.

Q. Do you recall any of the names? A. No. I don't recall the names.

Q. Did you speak to any Negroes in Springville? A. Yes, sir. More than apt to.

Q. More than two, maybe two or three? A. Yes. This is the country down here, and we come to town on Saturday evening, and you talk to this one and that one and the other one and you ask each one different questions, and from time to time the Jury Commission might come up, and so far as remembering identically who you talked to at what time about what, I have no more idea than a billy goat.

Q. All right. After you had these names and these were the areas you went to, these four precincts, what about Mr. Morrow? He isn't here. What areas does he cover, do you know? A. Well, he would be more familiar with the northeastern part or the northern part of the county up around Jenipher and Mantua and Houston and back up there, Knoxville perhaps.

Q. He has been sick for some time? [15] A. Yes. The boy is in bad health.

Q. And does he work regularly? A. I don't know.

Q. Is he able to get around? A. I don't know. Let's see. We are 38 miles apart. I wouldn't know anything about him other than his general condition.

Q. Okay. Now, insofar as determining who is eligible, did you estimate a decision about literacy, is that right? A. No. I don't make any literacy examination or determination either one. I don't know whether they can read or write or not, anybody.

Deposition of Albert Gray

Q. You don't check that out? A. No, sir.

Q. Other than the statement of someone like Mr. Brown telling you about these people, the recommendations they make about them, do you take his word for it? A. Yes, sir.

Q. And you don't check any further? A. No.

Q. And that goes for all of the people you check? [16]
A. That is right. If I go to a person, whether he is black, white, green, or blue, if he says such and such a person is all right, if he is morally all right and so forth and if they recommend them, then that is as far as I see any need to go. I am satisfied.

Q. Right. Any name that these people don't give you, you have no way of ascertaining that? A. We have ways of ascertaining it.

Q. Let me take that back. Besides last years' jury roll, besides the poll list, besides the telephone book and besides the recommendations of the people you speak to, do you have any other way of getting names? A. I expect you about covered it. Offhand I don't recall any other way. Of course, there may be.

Q. So if they are not on any of these four lists, meaning the jury list or voting poll or last year's telephone book, you don't have any other means other than people telling you? A. That is right.

Q. And you don't have any other way of getting [17] in touch with them? A. Not that I know of.

Q. You didn't go to any Negro organization, fraternities, clubs, or anything like that, did you? A. No.

Q. Did you suggest any Negro names of your own that weren't recommended to you? A. Yes; I did.

Q. And these are people you knew of your own knowledge? A. That is right.

Deposition of Albert Gray

Q. And this is from just this last year? A. Yes.

Q. And how many names like that did you recommend?
A. Well, offhand I recall one. I don't know whether there was more or not. There could have been.

Q. You think it was one or two? A. There could have been more.

Q. Do you think there might be more eligible people?
A. It is possible.

Q. Do you think that if you lived in Clinton, [18] for example, in the Negro community you might know other reputable people? A. I doubt it. I think it was pretty well covered. Of course, I don't say there wouldn't be. It could be. There is always a possibility in there, but I think it was pretty well covered.

There has been a conscientious effort to put all the qualified people regardless of race, creed, or color in the jury box, because personally I see no reason to not have anybody in there that qualifies.

Now, what we consider qualified, that is something else. Actually you may be off in the way you are thinking of qualified, I don't know.

Q. As far as the Negroes are concerned, you mostly get them from people? A. We have some knowledge, but our knowledge is limited on that. We have to rely more on what the other fellow says.

Q. Other than the few that you knew personally, the two or three you yourself knew, your standards are not the standards that are used for the Negro jurors by those that recommend them, are they? [19] If they think they are qualified. A. No. There is no difference in the standards anyhow.

Q. When you say that you speak to someone, now, you talk to Mr. Brown and he tells you that these eight peo-

Deposition of Albert Gray

ple, these are qualified and you accept his judgment? A. That is right.

Q. Okay. A. I don't set the standards for them.

Q. Right. What do you do with the voter registration list? Do you take all the names on the list and just check to see who has had a conviction?

Mr. Banks: I think Mrs. Yarborough has already testified that she checks for convictions for the Commission.

Q. But you don't exclude people from the poll list for something like that, you don't look to see if they are of bad moral character? A. We do look into that.

Q. So do you go through each name on the voting list and check them out? [20] A. Yes.

Q. Did you take any off of the voting list this year? A. I think so.

Mr. Jelinek: I think that is everything.

Mr. Banks: Let me ask you about two questions then, Mr. Gray. *

Examination by Mr. Banks:

Q. You were asked if you consulted any Negro organizations or clubs or fraternities or churches, and you replied you did not. Did you contact any white clubs or organizations for recommendations for people to be put in the jury roll? A. No, sir; I did not.

Q. And you have said that Howard Brown recommended someone to you as a prospective person to be put on the jury roll. You accepted his recommendation because of the fact that you knew Howard Brown has high principles and high standards? A. Exactly.

Deposition of Albert Gray

Mr. Jelinek: Of course, I am sure that is the reason. I have no other questions.

[21] Mr. Banks: Bob, is there anything else you can think of?

Mr. Bradley: No.

Mr. Banks: All right, sir.

FURTHER DEPONENT SAITH NOT

[22] Certification Omitted in Printing

Transcript of Trial

[1]

(Title Omitted in Printing)

CAPTION

THE ABOVE ENTITLED CAUSE came on to be heard before the Honorable John C. Godbold, Honorable Hobart H. Grooms, Honorable Clarence W. Allgood, sitting as a three judge panel on the 6th day of June, 1967, at or about 10 a.m., Birmingham, Alabama.

APPEARANCES :

Mr. Donald A. Jelinek, Lawyers Constitutional Defense Committee, 31½ Franklin Street, Selma, Alabama.

Mr. Robert P. Bradley, Assistant Attorney General, State of Alabama, Montgomery, Alabama; Mr. Ralph Banks, Jr., County Solicitor, Greene County Alabama, Eutaw, Alabama; Mr. Thomas H. Boggs, Circuit [2] Solicitor, Linden, Alabama, appearing for the Defendants.

Mr. Stanley Sikes, Montgomery, Alabama, appearing on behalf of the Hon. George C. Wallace.

Mr. Orzell Billingsley, Birmingham, Alabama, appearing for the Plaintiffs.

Mr. Leslie Hall, Assistant Attorney General, appearing for the Defendants.

BEFORE :

Carmen Zegarelli and Thomas P. Meador, *Commissioners.*

*Colloquy***[4]**

PROCEEDINGS

10 o'clock A.M.

June 6, 1967

Judge Godbold: Call the case of Paul M. Bokulich and others against the Jury Commission of Greene County; what say the plaintiffs?

Mr. Jelinek: Plaintiffs are ready, Your Honor.

Mr. Bradley: Defendants are ready.

Judge Godbold: For the benefit of any of you who may not know, I am Judge Godbold; on my right is Judge Grooms, and on my left is Judge Allgood.

Now, any preliminary matters we need to dispose of before we proceed with the hearing of this case?

Mr. Jelinek: Yes.

Mr. Bradley: Yes, Your Honor. May it please the court, I am Bob Bradley, Assistant Attorney General for the State of Alabama. This is Mr. Leslie Hall, Assistant Attorney General for the State of Alabama; this is Mr. Tom Boggs, District Attorney for the Seventeenth Judicial District of Alabama; and Mr. Ralph Banks, County Attorney for Greene County, Alabama.

We will be representing the Defendants in this matter and we would also like to know who is representing **[5]** the plaintiffs.

Judge Godbold: All right.

Mr. Jelinek: Plaintiffs are represented by myself, Donald A. Jelinek, and by Mr. Orzell Billingsley, whose name, Your Honor, we would like to have added to the record as one of the attorneys for the Plaintiffs.

Judge Godbold: All right, sir.

Do you have the written appearances or is the statement here sufficient?

Colloquy

Judge Grooms: It is sufficient.

Judge Godbold: All right.

Mr. Bradley, something else?

Mr. Bradley: Yes, sir. May it please the court, the defendants would like to substitute in the pleadings in the complaint any other pleadings filed, the name of Governor Lurleen B. Wallace for the former Governor, George C. Wallace, who is no longer Governor of the State of Alabama.

Judge Godbold: Any objection to that?

Mr. Jelinek: That is in the pleadings; no objection, Your Honor.

Mr. Bradley: And next item of business we would like to take up, if Your Honor please, is the [6] motion to quash the subpoena issued to the defendant, George C. Wallace; and I have already filed an original copy with the Court.

Judge Godbold: I have a copy that was filed with me about five o'clock yesterday afternoon.

Mr. Bradley: That was filed with Judge Godbold about 5 p.m., yesterday afternoon, yes, sir.

Now, to bring the other members of the court up to date, this motion states that George C. Wallace, one of the defendants in this proceeding, had attempted service upon him of a subpoena duces tecum, requesting certain records that he was supposed to have under his control and supervision, to be produced here at this time and also a personal subpoena for his subpoena to be here for oral testimony; now, our motion, we set out mainly that George C. Wallace was not served personally with the subpoena in this case. And we are attaching affidavit thereto by George C. Wallace stating what did happen plus copies of the two subpoenas.

Colloquy

Now, subsequent to the filing of this motion to quash, we made an effort to get in touch with the deputy United States Marshall that made service—or attempted [7] to make service upon this defendant, and he stated that he gave the subpoenas to Mr. Hugh Maddox, Legal Advisor to Governor Lurleen Wallace, to be transmitted to ex-Governor George C. Wallace, and I believe the return filed by the U. S. Deputy Marshall, Mr. James W. Burns, will reflect that statement.

Judge Godbold: Well, I have the return here, which I have just looked at a moment ago. It shows service upon Hugh Maddox, Legal Advisor to Governor Lurleen B. Wallace, who stated that Honorable George C. Wallace said for him to accept service for the former Governor.

Now, what is the status of Mr. Maddox; is he available?

Mr. Bradley: He is on two weeks active duty at Maxwell Air Force Base, Your Honor. If necessary, we will make an effort to get him up here so he might tell us just what did transpire.

Now, Mr. Burns is down at Dothan with Judge Pittman, they are holding court down there today, and we talked to him by telephone last night.

Judge Godbold: Now, what is your position, Mr. Bradley? It is your position that the return does not [8] show legal service upon Governor Wallace?

Mr. Bradley: Yes. That is my position, and furthermore, I would like to also state as to the subpoena duces tecum, I have the records with me today from the Governor's office for the period prior—four year period prior to January 16, 1967, as to the appointment of jury commissions in Greene County, Alabama, and I am prepared to furnish those to the plaintiffs for their use.

Colloquy

Now, I think it is—I think the court will take notice that ex-Governor Wallace is no longer Governor of Alabama, and therefore, does not have any control over the records in the Governor's office, and he could not, as custodian, present or bring or produce those records at this time, because he does not have control over them; is not custodian over them.

But to prevent any delay, as far as that matter goes, I have those records here for use of the Plaintiffs, and also I am willing, as I told counsel for the plaintiffs, Mr. Jelinek, I am willing to stipulate or admit certain facts relating to the appointment of members to the Greene County Jury [9] Commission for the four year period prior to January 16, 1967; and if that will assist in moving this case along, I am certainly prepared to do that.

Judge Godbold: Mr. Jelinek, what is your position both on the validity of the subpoena and also on the question of whether the records, plus the stipulation, would cover what testimony is sought to be obtained under this subpoena?

Mr. Jelinek: Your Honor, if I may answer the latter first; the second or third allegation in the complaint of the entire cause of action is that the Governor, Ex-Governor Wallace, personally discriminated wilfully and deliberately in excluding Negroes from service on the Jury Commission. It is not in his position merely as Governor at that time, but as an act of an individual, which we will attempt to show by cross examination of him, with the records which are provided.

Now, Mr. Bradley did telephone me and I explained to him by necessity the only stipulation that would suffice would be the stipulation that he admitted discrimination in the selection of Negroes to the Jury Commission. As to the

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service, I would assume that [10] the return is accurate by the U. S. Marshall, that the person to be served designates another, that he is either served directly or estopped to deny the service, and in either event, I would think that if this court rules as to the second issue, that the testimony of the ex-Governor is relevant; that as a public servant, the ex-Governor would voluntarily appear eliminating the first question of whether or not the—he directed the Marshall or otherwise.

Judge Grooms: You propose to ask him specifically did you discriminate in appointing the commissioners?

Mr. Jelinek: No, sir.

Judge Grooms: You just propose to ask him whether or not he appointed at that time white persons?

Mr. Jelinek: No; I propose to go into the manner of selection of white people in the State at Large.

Judge Grooms: I would imagine that they would concede that white people were appointed down there; what more would you need?

Mr. Jelinek: Of course, there is something in between; it is obviously not going to be in the form of a confession. On the other hand, it is not going [11] to be a simple question of white and black; for example, this whole case is based upon the alleged discrimination by the Jury Commission; we are not going to ask them, did you discriminate; we are going to step by step go through the process that led up to the choice by statistical evidence and by cross examination, and attempt to present to the court the evidence that will show the discrimination.

Judge Grooms: In other words, you want to go through the tedious detail of proving the ultimate fact that they approved only white people on this commission?

Colloquy

Mr. Jelinek: No, sir; there are two thousand odd eligible males in Greene County, 775 of which are white; now, if he considered the Jury Commissioners, the male Jury Commissioners only from that list, and excluded anyone from the other fourteen, fifteen hundred Negro eligibles, this would very much—would be discrimination, and this is the line we hope to develop on cross examination.

Judge Grooms: Do you want to go beyond the record? In other words, I understood the records here—

[12] Mr. Jelinek: Absolutely, Your Honor. The records would not prove discrimination, I don't believe.

Judge Godbold: All right. I think the court is now in position to rule on this.

The court is going to sustain the motion to quash this particular subpoena, since it shows on its face it does not comply with Rule 45, which requires that the subpoena be served on the person to whom it is directed.

The records, as I understand it, are available that were subpoenaed in.

Mr. Bradley: Yes, sir. That is correct.

Judge Godbold: About how long do you anticipate it will take you to put on the Plaintiff's case?

Mr. Jelinek: I hope that the case might be finished by early afternoon, Your Honor.

Judge Godbold: What is the estimate of your time?

Mr. Bradley: Your Honor, I do not think it will take us very long, but it will depend on the testimony of the Plaintiff.

Judge Godbold: If Mr. Jelinek can finish by [13] early afternoon, do you think you can finish by the end of the afternoon?

Mr. Bradley: Yes, sir.

Judge Godbold: Does either party desire the rule?

Colloquy

Mr. Jelinek: I do not, Your Honor.

Mr. Bradley: No, sir.

Judge Godbold: Will all the persons who are going to testify come forward?

Just stand where you are to be sworn.

(Witnesses sworn.)

Judge Godbold: Any other preliminary matters?

Mr. Bradley: Yes, sir.

Judge Godbold: All right, Mr. Bradley.

Mr. Bradley: May it please the Court, Judge Hildreth has been subpoenaed by the plaintiff, and he has a wife who is in Oschner's Clinic in New Orleans. He wants to leave as soon as possible to fly down, and I would like to recommend, if the plaintiffs would take him as one of their first witnesses so that he may be released.

Judge Godbold: Are you prepared to do that, Mr. Jelinek?

[13A] Mr. Jelinek: I arranged on the telephone it wasn't necessary for the Judge to be here subject to the slight possibility if there was some discrepancy between Mrs. Yarbrough's testimony today and that in the deposition, we might need him; I believe we may be calling Mrs. Yarbrough in an hour.

Judge Godbold: You mean after you finish with Mrs. Yarbrough you would take Judge Hildreth first?

Mr. Jelinek: I don't expect to call him.

Judge Godbold: Can we release him?

Mr. Jelinek: Not until Mrs. Yarbrough is through.

Mr. Bradley: We went through this in order to try to release Judge Hildreth, and Mr. Jelinek told me that unless I could guarantee that Mrs. Yarbrough would not change her deposition, and I could not guarantee that, and I had to tell him that it would be necessary for him to be

Colloquy

here; he is here and prepared to testify. Mrs. Yarbrough's testimony is going to be the lengthiest of anyone, because she is Clerk of the Commission.

Judge Godbold: I think the thing to do, certainly this court is not going to hold any witness [14] here who has need to be with his family in the hospital.

I will excuse Judge Hildreth, and if you wish to cross examine him on Mrs. Yarbrough's testimony you can do it by deposition or by interrogatories at the conclusion of Mrs. Yarbrough's testimony, the court will allow you to do that, either way that the plaintiff elects, either by written interrogatories or oral deposition, so that it will not be necessary to hold him here.

Mr. Jelinek: If I may, I made a better opening than that; I offered that the Judge remain in New Orleans subject to being called today.

Judge Godbold: I understand that, we are all trying to achieve the same thing, and I would say with that, Judge Hildreth should be permitted to go.

Any other preliminary matters?

Mr. Jelinek: Yes; I would ask the court to direct the United States Marshall or a Deputy in Montgomery, to attempt to personally serve George C. Wallace while this court is in session, to utilize the testimony discussed previously.

Judge Godbold: All right.

Mr. Jelinek: I might add if the Court rules that [15] Mr. Wallace's testimony is relevant based on the second point we discussed, that the court ask counsel, if counsel for Mr. Wallace would consent, that the ex-Governor voluntarily appear before this court.

Judge Godbold: We are not interested in that. I think it is appropriate to ask the clerk to notify the Marshall to attempt to serve Governor Wallace personally forthwith,

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and if he gets the subpoena, if he is appropriately served under Rule 45, while these proceedings are going on, fine.

You may have one other problem, and that is the question of whether this is beyond 100 miles; I have not checked that, I haven't verified that; if it is beyond 100 miles, it is the law he doesn't have to come anyway, unless he wants to, so you may want to check that to see if it is a useless maneuver. If it is beyond a hundred miles, I expect you are sending the Marshall on a useless trip.

Mr. Jelinek: Our understanding is it is under a hundred miles.

Judge Godbold: We will ask the clerk to notify the Marshall to attempt to serve Governor Wallace.

Any other preliminary?

[16] Mr. Jelinek: Yes, sir. If I might have five minutes to assemble some charts and documents, one of my colleagues just walked in with late.

Judge Godbold: The court will give you that. We will not formally recess, but we will give you a few minutes.

(Brief intermission.)

Mr. Jelinek: Your Honor, with the Court's permission, I would like to introduce Miss Kathleen Veit, who although not a lawyer, has assisted me in preparing a great deal of information in this case, and I would like for her to remain at the counsel table.

Judge Godbold: That is all right.

Mr. Jelinek: I would like to offer to counsel data we expect to prove. This is not evidence in any way, but merely a listing of what we are attempting to prove for your Honor's edification, if it is any help.

For a start, I would like to offer for judicial notice, the census for 1960, which is incorporated in the opinion of Judge Grooms in Coleman against Barton to the effect

Colloquy

that in 1960, males over 21, there were 775 white males, 2,247 non-white males, a total of [17] 3,022, and that judicial notice that the mathematic computation of the Negro males over 21 is 74% of that figure.

Judge Godbold: Those figures come out of Judge Grooms' prior judgment?

Mr. Jelinek: Except the percentage.

Judge Grooms: I don't presume they are disputed.

Mr. Jelinek: I would like to introduce my first witness.

Mr. Bradley: Before we start the testimony, I would like to say something.

Judge Godbold: You propose to make an opening statement?

Mr. Bradley: No, sir.

The defendants filed a motion to dismiss, and there is one point I would like to make. In that motion to dismiss, we raised the standing of Mr. Bokulich to be a plaintiff in this case, and we have cited some cases of the District Court in Alabama.

We would also like to point out to the court that this District Court has heard a case against the Greene County Jury Commission, and this court made a ruling in 1964 in which it entered a declaratory judgment [18] setting out the law that the Jury Commission would have to observe. It made findings of fact based on evidence submitted to the court from the years prior to 1964, and we would urge the court that it would be burdensome on the court and would be useless, it would serve no good purpose, to duplicate that evidence that has already been taken, and we would urge the court to consider only that evidence that this court entered its decree in 1964.

Judge Godbold: Are you suggesting that all the evidence taken in the case be considered evidence in this case?

Colloquy

Mr. Bradley: Yes, sir, and we only take that evidence since that time.

Judge Godbold: You have any objection to everything heard in that case being considered here?

Mr. Jelinek: Not anything if that was considered, but some conclusions we would refute and attempt to prove in this court conclusively; for instance, that the figures involving convictions are not accurate.

Judge Godbold: You mean in Judge Grooms' former judgment?

Mr. Jelinek: Not that the judgment is inaccurate, but the judgment based on refuted testimony [19] any of the evidence, I would not object to any of the evidence being considered, only insofar as it became part of the court's conclusion.

Mr. Boggs: Paul M. Bokulich has enjoined the Jury Commission of Greene County, he has enjoined the Grand Jury from acting; that was in the Fall of 1956, because he says of discrimination that existed at that time. We think that the testimony that goes back behind that could serve no good purpose whatsoever. There is testimony of what took place and how the Jury Commission operated at that time, who was in the Jury Box and from that time forward, and he said until these conditions are corrected in his petition here, and we can't see any good purpose that will be served going back years before and showing what has taken place in the past.

Judge Godbold: How far back do you expect to go with your proof, Mr. Jelinek.

Mr. Jelinek: Your Honor, for example, we will attempt to show that one man on the jury in 1966 has been for five straight years on the jury, to that extent we will have to go back; we are not trying to bring out old

Percy McShan—for Plaintiffs—Direct

skeletons in 1960, no Negroes [20] were on the jury.

Ever so slightly we will have to refer back insofar as the same people picked in the 1966 roll, but not further, Your Honor.

Judge Godbold: The Court's view of this matter, it is not really up to us for ruling at this point. Our view of the matter is that the Plaintiffs can go on and put on their proof, and within reasonable latitudes, if it goes back behind the other judgment, well, we will give you some reasonable room for maneuvering. We are not going to cut you off exactly at the date of the prior judgment. If the testimony gets out of hand behind the date of the prior judgment, then the court may at that time put a stop to it, and beyond that, we will just take up matters as we get to them.

Now, let's proceed with the proof.

Mr. Jelinek: With the court's permission, may I briefly comment on the one issue that counsel raised?

Judge Godbold: Let's don't have anymore argument, let's proceed.

All right. We are going to dispose of everything with one ruling.

[21] Mr. Jelinek: Call Rev. McShan.

REV. PERCY MCSHAN, being first duly sworn, testified as follows:

Direct Examination by Mr. Jelinek:

Q. Reverend, will you tell the court your age? A. I am 57 years of age.

Q. And you are one of the Plaintiffs in this case? A. Right.

Q. Where do you reside?

Percy McShan—for Plaintiffs—Direct

Judge Grooms: Is he an intervenor plaintiff or original plaintiff?

Mr. Jelinek: No, an original plaintiff.

Judge Grooms: All right.

Q. Where do you reside, where do you live now? A. I live at Boligee, Route 1, Box 109, Boligee, Alabama.

Q. In what County? A. Greene.

Q. And how long have you lived in Greene County? A. Well, I have lived in Greene County all of those years except three.

【21】 Q. And that means some 54 years; is that right? A. Yes, sir.

Q. Will you tell the court your education? A. Well, in the beginning, up until 1939, I finished Stillman Institute with two years of college training, and I taught school, and then I went to Alabama State in 1947, and part of 1948, and about one quarter short of a BS Degree.

Q. How many years of school was that? A. I taught five years following 1939.

Q. I mean to say, how many years did you attend school? A. About three years and two quarters.

Q. You went to grammar school? A. Yes, through high school.

Q. How many years all told is that? A. Well, all of high school and through four years of college almost.

Q. So is that more than twelve years? A. More than twelve years; it would be sixteen years almost.

Q. Sixteen years? A. Yes.

【22】 Q. And are you a minister? A. Right, but I am not acting at the present time.

Q. Now, I will ask you, Rev. McShan, if you can read English? A. Yes.

Percy McShan—for Plaintiffs—Direct

Q. Are you a habitual drunkard?

Are you afflicted with a permanent disease or physical illness rendering you unfit to be a juror; have you ever been convicted of an offense involving moral turpitude?
A. Not at all.

Q. None of those offenses? A. No.

Q. Are you familiar with Mary C. Yarbrough? A. To a certain extent.

Q. Do you know her? A. I just know her; I have seen her several times.

Q. Have you ever visited her office? A. I believe so; I believe I have been to the Western Union place there in Eutaw.

Q. Did you run for Public Office? A. Yes; I ran for Public Office.

Q. What office was that? [23] A. Tax Assessor.

Q. Is that in Greene County? A. Greene County.

Q. What was the result of your candidacy? A. Well—

Q. Did you win or did you lose? A. Well—

Q. Or is it still pending? A. Still pending.

Q. In this court, as a matter of fact, isn't it? A. That's right.

Q. Do you know Mr. Melvin Durrette? A. I slightly know him, too.

Q. Do you have any business dealings with him? A. I don't have any business dealings with him.

Q. Do you have an account at his bank, for example?
A. No; I have had an account there, but since I haven't been working, I don't have an account there now.

Q. Now, have you ever been called to be on a jury? A. Not at all, never, no, sir.

Q. Have you ever been requested to submit a list of members who would be eligible for a jury? [24] A. No.

Percy McShan—for Plaintiffs—Direct

Mr. Jelinek: I would ask counsel to stipulate that Mr. McShan is not on the jury list—jury roll.

Mr. Bradley: We don't know.

Mr. Jelinek: The jury roll is contained in the big book that I presented to you.

May I ask that the jury roll be presented that has been subpoenaed.

Judge Godbold: Do you have that, Mr. Bradley?

Mr. Boggs: I think all of those papers are here. I will have to get Mrs. Yarbrough to identify them.

Is there anything else in any of these papers you want Mrs. Yarbrough to identify.

Mr. Jelinek: While she is up here, if she could tell if Mr. McShan is on the jury roll.

Mrs. Yarbrough: What beat does he live in?

Q. Boligee, is that right. A. Yes, sir.

Mr. Bradley: Are we taking Mrs. Yarbrough's testimony now?

Judge Godbold: No, but there is no objection to her finding it in the record and letting Mr. Jelinek see what the situation is.

【25】 Mrs. Yarbrough: He is not listed under Boligee.

Judge Godbold: Let the record show that on examination of the jury roll, Mrs. Yarbrough states to the court that Rev. McShan's name is not shown for the Boligee Beat.

If you have any more questions like this one, Mr. Jelinek, let's save them until the records get before the court.

Mr. Jelinek: Then I would like to offer the record into evidence right now, the jury roll.

Judge Godbold: The Complete jury roll?

Percy McShan—for Plaintiffs—Direct

Mr. Jelinek: Yes.

May we have a stipulation from counsel the jury roll is identical to the jury box of 1966, that the jury roll for 1966 is identical with the jury box.

Mr. Hall: No, it can't be.

Judge Godbold: There being no objection, the jury roll is in evidence.

Mr. Hall: With the understanding copies will be made of the jury roll which is the only roll we have, and it will be returned.

Mr. Jelinek: We have a copy as part of the records and offer that list.

[26] Judge Godbold: Is there any question about the accuracy of the copy?

Mr. Hall: We don't know.

Judge Godbold: The original jury roll is received in evidence, and if the Defendants wish to check the validity of its copy and substitute, that is up to you.

If the copy is not agreeable to you, the original will remain in evidence.

(Plaintiff's Exhibit 1 received in evidence.)

Q. Now, Rev. McShan, at my request, did you examine a list of names purporting to be the names on the 1966 jury roll? A. Yes.

Q. And did you examine on a similar list the 1965 names for the jury roll? A. Yes.

Q. And did you put an "X" indicated under your name and other names that were Negroes on the jury roll in 1966? A. Yes.

Q. Did you do the same for 1965? **[27]** A. Yes, sir.

Q. Now, would you examine this document and tell the court if this is the document you so examined? A. This is the copy.

Percy McShan—for Plaintiffs—Direct

Q. Did you sign your name to both of those? A. I did.

Mr. Jelinek: I would like to offer this document for identification purposes.

Judge Godbold: Has Mr. Bradley seen it?

Mr. Bradley: No, sir; I haven't.

Judge Grooms: You checked the ones you knew to be Negroes on there; is that what you did? A. I did.

(Plaintiff's Exhibit 2 marked for identification.)

Mr. Jelinek: Now, at a later time, Your Honor, I will offer evidence to then establish this list, if the list was taken from the jury roll.

Judge Godbold: All right.

Q. From this list, Rev. McShan—

Mr. Jelinek: Before we get to that, may I have a stipulation that the jury roll for 1966, consisted of 471 names?

[28] Perhaps I could offer it from the deposition and maybe that would save time.

Judge Godbold: Are you going to offer the whole deposition or one question and answer?

Judge Grooms: You have no objection to that number subject to verification, do you?

Mr. Bradley: No, sir.

Mrs. Yarbrough says on the certificate she placed with the papers, that she certified the number in there.

Judge Godbold: Let me suggest this on these figures such as this, let's go on and proceed on this number subject to its being verified later by appropriate proof and any examination of the witness.

Percy McShan—for Plaintiffs—Direct

Let's hypothecate this is assumed to be correct. We can't try the case asking for stipulations and having them refused and calling people not on the witness stand to verify it.

Mr. Jelinek: Very well, Your Honor.

Q. Now, on the 1966 list, did you indicate how many Negroes you found on that list? A. 1966?

Q. Yes, sir. [29] A. 80, I believe.

Q. Would you like to check your figure at the end of the 1966 roll?

Judge Grooms: You didn't state how many were on the '65 list.

Mr. Jelinek: No, sir, we started with the '66 list, Your Honor.

Judge Grooms: You went—

Mr. Jelinek: Going backward from 1966 to 1965.

Judge Grooms: How many were on the '66 roll? I didn't note that.

A. 80. 80 on the 1966 list and 45 on the '65 list.

Mr. Jelinek: Now, Your Honor, we will demonstrate at a later time we have found two additional Negroes on the list to give the benefit of the doubt to the defendants, and, in fact, 82 names, but the testimony for this moment will be 80 and the percentage, if your Honor will bear with us, is 17 and not 19.

Q. And on the 1965 list you found how many? A. 45.

Mr. Jelinek: I now offer this document into [30] evidence.

Judge Godbold: Admitted.

(Plaintiff's Exhibit 2 received in evidence.)

Percy McShan—for Plaintiff—Direct

Q. Now, Rev. McShan, are you familiar with the male teachers in Greene County? A. Most of them, not all of the male teachers.

Q. I show you this list and ask you if you viewed this list last evening? A. I did, yes, sir.

Q. Using that list to—did you identify on that list those teachers in Greene County who are male and Negro? A. Yes.

Q. Did you come to a number? If you don't recall, why don't you call off here at this point the names, there are merely some twenty, the names of the male Negroes who are teachers in Greene County?

Judge Godbold: Let's have him mark this on the list, please.

Q. Which ones don't you know? A. I see one down here that I am not acquainted with, Lorenzo Robinson.

【31】 Q. And all others besides Lorenzo Robinson, you are acquainted with? A. Yes.

Q. Except for Mr. Robinson you know the rest? A. Yes.

Mr. Jelinek: I offer it into evidence, with the total being 25 male teachers.

Judge Godbold: Is this in the whole school system in the County?

Mr. Jelinek: That is correct.

Judge Godbold: Has he marked in some like manner those that are Negro?

Mr. Jelinek: They are all Negro.

Judge Godbold: All right.

Mr. Bradley: The defendants object to the introduction of this document into evidence. It does not

Percy McShan—for Plaintiffs—Cross

appear this is a certified statement by some authority in the county; this is a correct list of Negro male teachers.

It does not contain all of the teachers in the County, white, black, male or female; there is nothing to indicate this is the complete list of Negro male school teachers in the County, and on that basis, [32] we object to it being introduced, because we don't know whether that is all of them or not.

Judge Godbold: Overrule the objection; it will be admitted.

(Plaintiff's Exhibit 3 received in evidence.)

Q. Am I correct to the best of your knowledge—well, these names, to the best of your knowledge, are they the only male Negro teachers in Greene County? A. To the best of my knowledge.

Mr. Jelinek: Now, at this point I have no further questions, but in order to expedite time, there is another matter which will take substantial time later on, and I would like permission to recall Mr. McShan at a later time this afternoon.

Mr. Godbold: That will be allowed.

Cross Examination by Mr. Boggs:

Q. Will you state your name again? A. Percy McShan.

Q. On or about four years ago in the Justice of the Peace Court in Greene County, did you plead guilty to petty larceny and pay a fine? [33] A. Petty larceny?

Q. Did you pay a fine in Judge Bonner's Court in the Justice of the Peace Court, pay a fine in this court? A. When was that?

Percy McShan—for Plaintiffs—Cross

Q. About four years ago? A. No, sir.

Q. You did not pay any fine for petty larceny; you deny that under oath? A. I don't remember anything about it.

Q. A check was involved in the matter. You don't remember anything about the check and coming in and having a hearing before Judge Bonner, and coming in and pleading guilty? A. I don't even know the name you are calling.

Mr. Billingsley: He says he doesn't remember.

Judge Godbold: I think this is legitimate cross examination. Go ahead.

Q. Judge Neville is the one that operates the Hotel, you know him, you say you know people all over Greene County? A. Yes, sir.

Q. You didn't pay a fine in his court?

【34】 Mr. Jelinek: If we can save time, we have subpoenaed the criminal convictions of Greene County.

Judge Godbold: This is legitimate cross examination, just take your seat, please, sir.

A. I am trying to see if I can remember.

Q. A check was involved in the matter. A. A check?

Q. Yes, you pled guilty and paid a fine. A. I just don't remember that.

Q. You wouldn't say you did not? A. I wouldn't; I don't remember.

Q. All right. A. I know Mr. Neville.

Q. You don't remember appearing before him and paying a fine for petty larceny and the court cost, and pleading guilty; you have no recollection of that? You have no rec-

Percy McShan—for Plaintiffs—Cross

ollection whatsoever of this happening four years ago? A. I don't remember.

Q. But you don't say you were not, do you?

Mr. Billingsley: Your Honor, he is arguing with the witness. The witness has answered the question, and he keeps asking the same thing over and [35] over.

A. I don't remember.

Q. Do you know all of the teachers in the County? A. Up until 1963, I was acquainted with practically all of the teachers in the County.

Q. Up until 1963? A. Up until 1963.

Q. But you don't know them since that time? A. I know them all since that time except a few that has been added.

Q. Did you prepare this list, or did somebody else, Plaintiff's Exhibit 3, that was introduced in evidence? Did you prepare that? Did you type it out yourself? A. No, sir; I didn't.

Q. Was it under your direction it was made? A. No.

Q. The first time you saw it was when? A. I saw it yesterday.

Q. Yesterday was the first time you had ever seen it?

You don't know who prepared it, do you? A. Well, probably I saw it three or four weeks ago, but I saw it yesterday.

[36] Q. But you didn't give the information to them to be put on that paper, did you? Who showed it to you, Mr. Jelinek? A. I don't know whether—

Q. You don't know whether Mr. Jelinek was the one that showed it to you or not? A. It was brought into the office.

Q. It was brought in to you? A. Yes, sir.

Percy McShan—for Plaintiffs—Cross

Q. But you don't know who brought it in to you? A. No, sir.

Q. Do you know how many of them on there are over 65 years of age? Do you know the ages of them? A. I can tell you those people that are pretty old.

Q. But you don't know whether they are over 65 or not? A. They are not over 65.

Q. Nobody on there is not over 65? A. I don't think anybody on there is over 65.

Q. You don't think so? A. I don't think so.

Q. You don't know but what they are; do you? [37] A. No, sir, they are not over 65.

Q. No one on there is over 65? A. I wouldn't say no one is over 65, because some teachers teach after they get 65.

Q. Are any of those teaching now 65? A. I don't believe anyone there is 65.

Q. What part of Greene County do you live in? A. Well, I live in, I will say the Southern part of the County, down in the Beligee Bent.

Q. Are you acquainted with the Negroes from one end of the county to the other, and the white people, too? A. To a certain extent.

Q. You say you went over the jury roll and you checked out the ones you happened to know and know they are colored? A. I looked over the whole roll, white and Negro, and I picked out the Negroes I knew.

Q. There could be some on there you did not know? A. I think I know most of them.

Q. Some Negroes and white people have the same name in Greene County, don't they? A. Yes, sir.

Q. And you don't know the ones like that? [38] A. I know the Negroes from the white.

Percy McShan—for Plaintiffs—Cross

Q. The ones you picked out, and there could be others on there you didn't recognize; is that right? A. I seriously doubt that.

Q. You think you know every Negro in Greene County? A. I don't know every one, but I know the ones on the jury list.

Q. Do you know the names of everybody on the jury list? A. Impossible.

Q. How do you know the names of all the Negroes that were on there?

Mr. Jelinek: I object to that; he identified to the best of his knowledge who was Negroes.

Judge Godbold: I sustain.

Q. Do you know Mr. Banks here, the County Solicitor of Greene County? A. Yes.

Q. To refresh your recollection and going back on that again, he was present at the time you pled guilty to this, do you recall that? A. You say four years ago?

Q. About four years ago? Have you ever pleaded guilty [39] on that? A. Well, I have never pled—I don't remember pleading guilty to anything, but I know I was charged with a back rent not long ago.

Q. With what? A. I was charged by Mr. Banks for some rent. A fellow went way back to collect from me that I did not know; I was charged with it.

Q. I am talking about in Greene County, paid a fine before Mr. Neville on Petty Larceny? A. It must have been another McShan; I don't remember.

Mr. Boggs: All right.

Mr. Jelinek: I would like to have the criminal

Colloquy

conviction books produced. They are under subpoena.

Mrs. Yarbrough: I am not allowed to bring those out of my office. I am subpoenaed as clerk of the Jury Commission.

Mr. Jelinek: That is fine. It won't be necessary, because we have already Xeroxed or had a list made and at Mrs. Yarbrough's request at a time when we were able to get the information, and we have put the list in alphabetical order.

[40] There are 466 individuals charged with crimes. I offer this document into evidence to be substantiated at a later date to show there is no Mr. McShan on the books.

Mr. Hall: We object to that method of offer.

Mr. Jelinek: Then bring in the books.

Judge Godbold: Address your remarks to the court.

Let's get first to the question whether the books were required to be produced here.

Your subpoena under which the production was sought was directed to whom, Mr. Jelinek?

Mr. Jelinek: Mary C. Yarbrough, Clerk of Greene County Jury Commission, Eutaw, Alabama.

For your Honor's edification, Mrs. Yarbrough is also Clerk of the Circuit Court of Greene County.

Mr. Boggs: May it please the court, those are separate entities.

Judge Godbold: I understand that, Mr. Boggs.

The Court's ruling is under this subpoena, technically, the records are not required to be produced. It is addressed to Mrs. Yarbrough in her capacity

Colloquy

as Clerk of the Jury Commission. The Court is going to [41] accept in evidence the record you have.

Now, will you state to the court, describe to us, what that photostat is, where it came from, and who prepared it?

Mr. Jelinek: This is not a photostat, Your Honor.

At our request, during discovery, Mrs. Yarbrough consented at our expense, to have some person copy the names of those on the conviction list; that list was submitted to us and we broke this list down in alphabetical order and there is the list; that is the list I have here today.

Judge Godbold: That is the list prepared by Mrs. Yarbrough?

Mr. Jelinek: No; this is a list broken down into alphabetical order from a list prepared by Mrs. Yarbrough, or someone employed by her.

Judge Godbold: Who prepared it?

Mr. Jelinek: Prepared by me.

Judge Grooms: Does that purpose to show the conditions in the Justice Courts or Circuit Court?

Mr. Jelinek: I can see they have crimes involving traffic offenses, which leads me to believe that— [42] I couldn't say this. I think Mrs. Yarbrough—

Judge Allgood: It would seem to me just observing this witness would be able to say whether he was or was not. He has answered up to now he doesn't know or doesn't remember.

Mr. Jelinek: Let me try that, Your Honor.

Percy McShan—for Plaintiffs—Redirect

Redirect Examination by Mr. Jelinek:

Q. Rev. McShan, have you ever been charged with a crime of petty larceny or taking somebody else's money?

A. No.

Q. Have you ever been in a court in Greene County and before a Judge and pleaded guilty or been found guilty by a jury? A. No.

Q. Did you ever pay a fine or receive a sentence? A. No, sir.

Judge Godbold: You don't really know whether that includes Justice of the Peace Court Convictions or not, the list that you hold in your hand?

Mr. Jelinek: Was the question in a Justice of the Peace Court?

Mr. Boggs: Yes, sir.

【43】 Mr. Jelinek: I would take counsel's statement as to whether it is.

What does it—

Mr. Boggs: No—

Judge Godbold: Do you know whether the list he has includes Justice of the Peace Court Convictions or not?

Mr. Boggs: I have never seen that list. I didn't have it prepared.

Mr. Jelinek: Mrs. Yarbrough knows.

Judge Godbold: Will you examine it and confer with Mrs. Yarbrough, and Mrs. Yarbrough will be prepared to testify on this later, and let's proceed from here.

Mr. Jelinek: That is all the questions I have, Your Honor.

Thomas Earl Gilmore—for Plaintiffs—Direct

Mr. Boggs: It does not include Justice of the Peace Court.

Judge Godbold: You state to us, Mr. Boggs, the list Mr. Jelinek has does not contain the Justice of the Peace Court convictions?

Mr. Boggs: Yes, sir, Mrs. Yarbrough just informed me it includes the convictions in the Circuit Court [44] only.

Judge Godbold: All right.

(Witness excused.)

Mr. Jelinek: Call Rev. Gilmore.

THOMAS EARL GILMORE, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jelinek:

Q. Rev. Gilmore, would you tell the court your full name? A. Thomas Earl Gilmore.

Q. And how long have you lived in Greene County? A. About 24 years.

Q. And how old are you now? A. 26.

Q. And what is your occupation? A. My occupation is Minister in the community, community worker.

Q. Can you read English? A. Yes.

Q. Have you ever been convicted of an offense involving moral turpitude? [45] A. No, sir.

Q. Are you a habitual drunkard? A. No, sir.

Q. Are you afflicted with a permanent disease or physical infirmity that renders you unfit to be a juror? A. No, sir.

Mr. Jelinek: I will ask the court to take judicial notice, subject to connection later on, of the jury roll, Mr. Gilmore's name does not appear.

Thomas Earl Gilmore—for Plaintiffs—Direct

Q. Have you ever been asked to bring a list of qualified Negroes? A. No.

Q. Are you acquainted with Negroes in Greene—in the community— A. I would say—

Q. In Greene County? A. I would say I am.

Q. Would you tell the basis for your acquaintanceship with Negroes in Greene County? A. Well, I have been a minister in that community since 1959, except for two of those years, and I am a Candidate for Sheriff in that County now.

[46] Q. In the course of being a candidate for Sheriff, do you have occasion to visit the precincts? A. Yes.

Q. Was your candidacy any basis in your acquaintanceship with Negroes in Greene County? A. Yes, very much so.

Q. Now, I ask you if previously, last night, and other times, I showed you this document which is made up of photostats of the jury venires of Greene County and ask you if this is the list you saw last night and identified? A. Yes; this is the list.

Mr. Jelinek: I would like to offer the list into evidence.

Mr. Bradley: Your Honor, this is a list of the venire since 1960 and going back to our preliminary statement to the court, we are going to object to going beyond the decree of this district of 1964.

Mr. Jelinek: You know, Your Honor, with the court's permission, it will take nothing more than the statement there were so many names, an item that will take no more than five minutes of the court's time.

[47] Mr. Bradley: I—

Thomas Earl Gilmore—for Plaintiffs—Direct

Judge Godbold: Is there any objection to the form of the exhibit, or the accuracy of it?

Mr. Bradley: No, sir. It appears to be the venire list submitted to the Sheriff of that county.

Judge Godbold: It will be admitted.

(Plaintiff's Exhibit 4 received in evidence.)

Q. Now, Rev. Gilmore, from 1960, would you indicate if you have identified the number of Negroes on each venire, and call off that number?

Mr. Jelinek: With Your Honor's permission, the venires are broken down into lists for each session. You have Spring, there will be a Grand Jury and Civil venire, which is usually 65 or more members, and there is a Civil venire which is 50 members, thereby, two venires for each session; we designate them for long and short to make it simple, that one which has the least number is criminal, and it is also true that that which has the large number is the Grand Jury—Civil venire, or the long venire.

Q. I will call off the venire and ask you to make identification.

Mr. Jelinek: Your Honor's copy of this is on [48] the front page of the document I handed to you.

Judge Godbold: The final data shown on that chart.

Mr. Jelinek: Yes, sir.

Judge Grooms: Is there any question he would testify to that information shown on there?

Judge Godbold: What do you propose to do, have him orally state the items that are shown on this chart?

Colloquy

Mr. Jelinek: That is correct, Your Honor.

Judge Grooms: I don't see why we should waste the time of the court going through that if you concede he would testify to what is up there.

Mr. Bradley: I—

Judge Godbold: Could he simply examine the final data shown and I assume he is going to testify to the number of whites on all venires?

Mr. Jelinek: That is correct.

Judge Godbold: Would his testimony be that the figures shown on the final data chart which is on the stand were the figures which he calculated from the venires?

Mr. Jelinek: That is correct.

[49] That is correct, Your Honor, except for Fall, 1966, where we rely on the statement of Mr. Banks in the deposition. For Spring, 1966, through Spring, 1960, that would be correct.

Would you check the list, Rev. Gilmore, from Spring, 1960, to Spring, 1966, and see if these numbers tabulate?

Judge Godbold: Let's leave this situation this way, that this witness will testify to the figures shown on your chart, your final data chart, which we anticipate you are going to offer in evidence, under the number of white for the respective jury venires, or the numbers that he has calculated are non-whites based on his examination of the jury venire records; if there is any discrepancy in that, it will be corrected later in the proceedings today. Otherwise, this is what he would testify except for the figures for the Fall of 1966.

Thomas Earl Gilmore—for Plaintiffs—Direct

Did I correctly state that?

Mr. Jelinek: Yes.

Q. Reverend, after you leave the stand, will you go over the list, and if your findings are any different from these findings, you will present that, bring that to my attention and the court's. [50] A. Yes, sir.

Mr. Bradley: Are we to understand that he is supposed to be testifying as to each of the breakdowns?

Judge Godbold: All he is testifying to is the number of non-whites at this point.

Mr. Jelinek: Needless to say, that does not cover percentages.

Judge Grooms: He has the whites and the non-whites there, too.

Mr. Jelinek: That's right.

Judge Grooms: The total of the two?

Mr. Jelinek: As we offer into evidence the total of the names will be in each, in these venires. Rev. Gilmore has testified to the number of non-whites leaving the whites the difference.

In the same way, I would like to have Rev. Gilmore, subject to recall for the same reason as Rev. McShan, and I have no further questions.

Judge Godbold: What would he be subject to recall for?

Mr. Jelinek: He would be the one to identify the later date names of Negroes that are not on the jury [51] roll.

Judge Godbold: All right.

*Thomas Earl Gilmore—for Plaintiffs—Cross**Cross Examination by Mr. Boggs:*

Q. Do you know all the people in Greene County? A. No.

Q. You don't know all the Negroes or all the whites either, do you? A. No.

Q. And you have figured out from here, from the roll, the ones you knew? A. Yes, sir.

Q. There could be others on there you did not know; is that right, since you don't know everybody on there?

A. There could be. This is to the best of my knowledge.

Q. You say you are a Minister; do you preach in a church? A. Yes.

Q. You say a community worker. What is a community worker, what kind of work have you done at that? A. I have worked as a community worker.

Q. I couldn't understand you? [52] A. Getting people together so that they can help themselves, where they are first needed.

Q. First need what kind of help? A. For instance, I work with the poor people in my community trying to help them get something that they need, organizing them so that they can be a group, and they can better get than an individual.

Q. How old are you? A. 26.

Mr. Boggs: That is all.

Mr. Jelinek: No further questions.

(Witness excused.)

Mr. Jelinek: Now, Your Honor, at this time, I would like to, by stipulation, or otherwise, finish the figures on this list. These figures are in the deposition; I think it would save time.

Colloquy

For example, if counsel would stipulate out of 65 names on the jury venire 19 to 20 were black; this was the absolute testimony of Mr. Ralph Banks.

Mr. Banks: I will stipulate there were 20, not 19. That is the Fall of 1966?

Mr. Jelinek: Yes, sir.

* [53] And for the criminal or short venire—

Judge Grooms: Are we going through this figure by figure?

Mr. Jelinek: There are only a few and this will be all the figures in this trial.

Judge Godbold: Go ahead.

Mr. Jelinek: Now, in the short venire, twenty Negroes out of 50.

Mr. Banks: Right.

Mr. Jelinek: Now, for the 1961, 1962, and 1963 figures, these are taken from the findings of Judge Grooms in Coleman against Barton, which counsel has stipulated in the deposition if the same evidence was offered before this court, the results would be the same, if the same evidence that led to Judge Grooms' conclusion—

Judge Grooms: A stipulation in a deposition, you don't offer into evidence something binding on this proceeding.

Mr. Jelinek: I would like to offer the deposition into evidence.

Judge Godbold: Of whom?

Mr. Jelinek: Mrs. Mary C. Yarbrough, Albert Gray, [54] and Melvin Durette, leaving out Mr. Morrow who is too ill to attend.

Judge Godbold: Do you propose to call any of these people later as witnesses?

Colloquy

Mr. Jelinek: Yes, Your Honor.

Judge Grooms: Unless they are parties that would not be admissible into evidence.

Mr. Jelinek: They are all parties.

(Plaintiff's Exhibits 5, 6 and 7 received in evidence.)

Mr. Jelinek: The last page of figures were taken from statements of Mr. Ralph Banks as the actual Grand Juries of 1964, 1965 and 1966. These will take a little time, for they are not numbered; perhaps we can do the same way, let Mr. Banks correct it at a later time.

Judge Godbold: Let the record show which figures we are talking about.

Mr. Jelinek: Under the Grand Jury.

Judge Godbold: Which Grand Jury?

Mr. Jelinek: All of them.

Judge Grooms: Let the record show that the figures on the final data chart are as testified to [55] by Mr. Banks, unless before this proceeding is over today he calls to your attention and the Courts' attention that any of those figures are not correct.

Mr. Jelinek: I now offer the chart into evidence.

Judge Godbold: It will be received.

(Plaintiff's Exhibit 8 received in evidence.)

Mr. Jelinek: I would like to offer this chart which now has here the figures for the Fall, 1966 Grand Jury and Civil Venire—the '66 figures that concern the Plaintiff Bokulich.

Judge Godbold: Then all the figures come off the other chart?

Mr. Jelinek: That is correct, Your Honor.

James O. Parker—for Plaintiffs—Direct

Judge Godbold: Any objection?

(Plaintiff's Exhibit 9 received in evidence.)

Judge Grooms: That 19 has been stipulated it will be 20. The 19-20 is stipulated as being 20.

Mr. Jelinek: That is right.

Judge Godbold: Any objection now?

Mr. Bradley: No, sir.

[56] Judge Godbold: The chart will be received.

Mr. Jelinek: I would like to call Mr. Parker.

JAMES O. PARKER, called as a witness, being duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jelinek:

Q. Mr. Parker, are you a member of the United States Civil Service Commission? A. I am an employee of the Commission.

Judge Grooms: What are your initials, please.

A. James O.

Q. Would you tell us your full title? A. Examiner Acting as State Supervisor of Voting Rights Program for Alabama.

Q. And as part of your duties—do your duties include registering people to vote under the Voting Rights Act of 1965? A. Yes.

Q. Or supervising others to do that work? A. Yes.

Q. Do you have the figures for the number of Negroes registered to vote as of August 16, 1966, on this date, **[57]** in the State of Alabama? A. I—

James O. Parker—for Plaintiffs—Direct

Mr. Boggs: We object, may it please the court, unless he shows that it is within the limits the Jury Commission is supposed to put on the roll. Those over 65 are supposed to be excluded.

Mr. Jelinek: May I point out to the court—

Judge Godbold: What is the relevancy of this? You are asking about voters, not jurors?

Mr. Jelinek: I want to demonstrate, first of all the statute requires the Clerk of the Jury Commission to scan the registration list for potential jurors.

Secondly, the potential juror list is a total list from which jurors may be chosen irrespective of statutory requirements.

Thirdly, there is an indication of criminal conviction, because most of the convictions which bar a juror, bar a voter.

Judge Godbold: You are asking about state-wide or Greene County?

Mr. Jelinek: I am in the County.

Judge Godbold: With respect to Greene County, proceed.

[58] A. We make no differentiation among those certified to the local officials as to race.

Q. Do you report to the Justice Department the number of Negroes registered to vote in each county on either a monthly or quarterly basis? A. My office does not; now, in the central office in Washington, there is an interchange of information.

Q. Now, where does the interchange of information from Alabama come from? A. The Commission, from daily reports.

Q. From— A. From the examiners in the field.

James O. Parker—for Plaintiffs—Direct

Q. And do your copies of that go through your office?

A. Yes, sir.

Q. And do those copies indicate race? A. I believe that there is an indication of race on some of them.

Q. With the utilization of those copies, can you tell us the number of Negroes registered to vote in Greene County?

Mr. Hall: I object to this testimony, Your Honor. The testimony of this witness is the list is [59] furnished by the Civil Service Commission to the local registration levels, does not reflect race. That is the voter registration list that the clerk of the Jury Commission is required to scan; the Clerk of the Jury Commission is not required to scan anything in the files of the Civil Service Commission or Department of Justice; we object to that testimony as to what may be on this list, or what may have been reported to Washington or the Civil Service Commission or the Department of Justice.

Mr. Jelinek: Maybe I could clear this up by asking one question.

Judge Godbold: Go ahead.

Q. Do you inform the State Registration—when someone comes to be registered by you, do you give this information to the County? A. On the last day of each month, a list of eligible is certified to the Probate Judge of the County concerned.

Q. So that the County will know who is registered by the Federal Government; is that correct? A. That is correct.

Judge Godbold: I am not clear on what he is about to testify to.

James O. Parker—for Plaintiffs—Direct

[60] Mr. Jelinek: To the number of—well, for a start, the number of persons who are registered in Greene County, and secondly, if he can so identify it, by race.

Judge Godbold: Do his monthly reports reflect the number of people registered, or only the ones registered by the Federal Registrars?

Mr. Jelinek: By the Federal Registrars.

Judge Godbold: What are you asking?

Mr. Jelinek: Whatever information he has; if he has it, the full information, I want that. If he has only the Federal information, I will be satisfied with that.

Q. Tell us what information you do have and whether it indicates race? A. The information in my possession does not make any differentiation as to race; the differentiation, if it is perceptible, is from documents in the office of the Central Office of the Civil Service Commission, in Washington, at the present time.

Q. But it does not go through your office? A. Yes.

Q. Do you keep it? **[61]** A. I do not keep even copies of the documents I forward to them in Washington.

Mr. Hall: I move to exclude his testimony.

Q. So you can't identify them by race? A. Not absolutely.

Q. Can you calculate the percentage of those who come to be registered by the Federal Examiners, what percentage is Negro?

Mr. Hall: We object; no proper predicate is laid.

Mr. Jelinek: I might add that the testimony in the Coleman case is based exclusively on this tes-

James O. Parker—for Plaintiffs—Direct

timony. Judge Hildreth testified approximately ninety percent of the crimes are committed by Negroes.

Judge Godbold: I think it will help the court to stay on one line of questioning; I know that I am not able to follow, but when you talk about total voters, and when you talk about your last question, it went back to people who were Federally registered; if you will take this up in some orderly manner, I think we can rule on it as it comes up.

Q. Do you have any information as to who is registered by the County? [62] A. No, sir.

Q. Let's deal solely with those people registered by the Federal examiners in Greene County.

Now, you have a number of different people who come to the office in Greene County from time to time, now it is once every so many Saturdays, right? A. Right.

Q. And you register anyone who comes in.

Now, can you tell this court—

Mr. Hall: I object to that.

Mr. Jelinek: I haven't asked the question.

Mr. Hall: You made a statement.

Judge Godbold: If you have any objections, address them to the court.

Mr. Hall: We object to Mr. Jelinek's stating in effect that this man registers anybody who comes in.

Mr. Jelinek: I will withdraw the question.

Q. Changing that to those who are qualified under the Voting Rights Act of 1965, can you give this court an estimate of what percentage of those persons who come to the Federal Registrar in Greene County are Negro?

James O. Parker—for Plaintiffs—Direct

Mr. Boggs: I object, unless he is there all of [63] the time or unless he knows of his own personal knowledge.

Judge Godbold: I think it will have to be sustained under the present predicate.

Q. What information do you have to form a judgment as to what percentage racially come to the Federal Registrar?

Mr. Boggs: I object to the question in that form.

Judge Godbold: That is overruled.

Q. Will you answer the question? A. The only predicate I would have for such an opinion would be the local examiners verbal report to me at the conclusion of an examining day.

Q. Does the Justice Department or the F.B.I.—have you seen copies of their breakdowns by race of your County, Greene County?

Mr. Hall: We object, Your Honor.

Judge Godbold: That is overruled.

Q. Have you seen these? A. Yes, sir, I have.

Q. Do they substantiate the verbal findings of your Federal Examiner?

[64] Mr. Hall: We object to that, Your Honor, purely hearsay.

Judge Godbold: That is sustained.

I would think this is information the court wants and is entitled to in this case, if pertinent to the issue; I would think this witness could testify as

James O. Parker—for Plaintiffs—Direct

to his best judgment based on the performance of his duties and his supervisory functions of what percentage of people would come to the Federal Registrar to be registered are Negroes.

The objection that would be made would go to the weight of that testimony, and not to the admissibility.

Q. Did you hear the Court's statement? A. Yes, sir, I did.

Q. Would you answer that as a question and give an answer? A. In my best judgment, the percentage of non-whites would exceed 95% of the total.

Judge Godbold: Is that percentage of people who are applying to the Federal Registrars to be registered?

A. Yes, sir.

Judge Godbold: That percentage is not necessarily [65] registered, they are applicants? A. Right.

Q. This doesn't count rejections? A. Mr. Jelinek, the process of implementing registration under the Voting Rights Act is a matter of stages. A list of eligibles is certified to the Probate Judge, and if there is a defect, they are still not registered until the Probate Judge puts them on his register.

Q. But do you have any information as to the number or percentage of rejects? A. It is small.

Q. Is it less than five percent? A. Yes.

James O. Parker—for Plaintiffs—Direct

Q. So let's assume that all the rejects were Negro, let's make the figure even ninety percent; what is the total number of Negroes that are registered to date?

Judge Grooms: You mean in Greene County?

Q. I mean in Greene County, I am sorry? All questions are directed to Greene County? A. According to my list, there were 1326 eligibles on the first list; 311 on the second; 133 on the third; [66] 83 on the fourth, 124 on the fifth; 66 on the sixth; 27 on the 7th; 11 on the eighth; three on the ninth; five on the tenth; seven on the eleventh; one on the sixteenth; and one on the nineteenth.

Q. What do these lists refer to, are these dates? A. Monthly certifications to the Local Probate Judge.

Q. This is the total? A. Yes.

That is the total for each month.

Q. The list started when and ended when? A. The first list started on November 8th.

Q. Of? A. 1965, and terminated at the close of business on November 22, 1965.

Q. Your very last list? A. No, that is the original.

Q. What is the last list? A. The last list was May 1, 1967, through May 27, 1967.

Q. Could you tell me at what point August 16 comes in there, which of those lists, August 16, 1966? A. It comes at list ten.

[67] Q. How many numbers were on that list? A. Five names on that particular list.

Q. Am I correct that for your list ten with five names—let's take the list before that, the list that had three on it, number nine, that list was in what month? A. Certified the 22nd of July, 1966.

James O. Parker—for Plaintiffs—Cross

Q. When was that submitted to the Probate Judge? A. It was certified and mailed that date.

Judge Godbold: Mr. Parker, these figures you have given the court are Negro registrants?

A. No, sir; these are total figures.

Judge Godbold: Your estimate of that total figure—

A. Better than 95% are non-white.

Judge Godbold: All right.

Mr. Jelinek: Thank you very much.

Judge Grooms: Do you have the total that has been certified?

A. I do not.

Judge Grooms: The ones you have read out are the ones that have been certified?

A. Yes.

[68] Mr. Jelinek: I have no further questions.

Cross Examination by Mr. Boggs:

Q. Mr. Parker, what are your initials, please, sir? A. James O.

Q. Where do you live? A. Montgomery, Alabama.

Q. How long have you been with the Civil Rights Commission? A. I am now an employee of the Civil Service Commission.

James O. Parker—for Plaintiffs—Cross

Q. How long have you been engaged in this work? A. Since November, 1965.

Q. Were you present when many of them were registered in Greene County? A. I have never been present when any eligible was registered in Greene County.

Q. Have you ever examined and looked over the list of the ones that are registered and come in contact with those so as to be familiar with some of them or a large number of them? Let me break it down this way.

You don't keep an account of the age on different [69] lists? A. The age is stipulated on the list, the age they gave to the examiner.

Q. And many of them in Greene County, I will ask you, were they not over the age of 65, from your information, and from your review of the files and figures? A. I am certain some were.

Q. I mean a large number of them? A. We can search the list; the age is stipulated on each list.

Q. I will ask you if you are not familiar that there in this area of the Black Belt, many are illiterate, they wouldn't be able to even tell the people that registered them the area of the County, except I live on so and so's place, and many of them were like that? A. It was so reported to me.

Q. Many of them that were registered? A. Yes.

Q. And you are familiar with the laws of Alabama that the qualifications of jurors are quite different as qualifications of a voter? A. Jurors—

Judge Godbold: You don't have to ask him about [70] the law, Mr. Boggs; we are familiar with that. Mr. Boggs: All right, sir.

James O. Parker—for Plaintiffs—Cross

Q. The list you have, Mr. Parker, does it reflect any convictions for crimes? A. I don't follow you.

Q. Did the list that you have show whether anyone registering to vote had been previously convicted of a crime, or whether they had received a pardon? A. The list is of eligibles. Those who have been convicted of a disqualifying crime, by their own admission, are rejected and not enrolled.

Q. Unless they have received a pardon? A. Right.

Now, their application for enrollment or for registration does reflect a summary of their criminal experience or their experience in court.

Q. According to what they give? A. Right.

Mr. Boggs: That is all.

Mr. Jelinek: No further questions.

(Witness excused.)

Judge Godbold: How long will your next witness take?

[71] Mr. Jelinek: Briefly, this will be similar only as to the State Court.

Judge Godbold: Do you think we will be through with the next witness by noon?

Mr. Jelinek: I could try; it is Judge Herndon, to ask him the figures of the State.

Judge Godbold: Call your next witness.

Mr. Jelinek: Judge Herndon.

James D. Herndon—for Plaintiffs—Direct

JAMES D. HERNDON, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jelinek:

Q. Mr. Herndon, you are the Probate Judge of Greene County? A. Yes, sir.

Q. You have with you by subpoena a map that was requested? A. Right.

Q. State your name, please? A. Dennis Herndon.

Mr. Jelinek: We will offer this in evidence later, to save time.

[72] Q. Do you have a list of those registered to vote by your office in Greene County? A. All of the voting records are under court order and are held by the United States Marshal here in Birmingham. I don't have any except what has been filed with me in the last six months.

Q. And that is negligible? A. It is here, whatever it is.

Q. How many names would that be? A. I haven't added it.

Q. Roughly fifty or a hundred? A. I haven't added it.

Q. Do you also have with you the vouchers? A. I do.

Judge Grooms: What do you mean by vouchers?

Mr. Jelinek: I asked him to produce vouchers of payments made. We won't have to take up any time on the Voter Registration.

Q. Vouchers indicating payment to members of the Jury Commission? A. Yes.

Mr. Bradley: May I ask what period is covered?

Judge Godbold: What period does it cover?

James D. Herndon—for Plaintiffs—Direct

[73] A. '65 and '66.

Mr. Jelinek: I would like to offer these into evidence—I will do it both together.

Q. What does this represent? A. If it please the court, this is a very valuable map. I don't want to leave it in Birmingham.

Mr. Jelinek: We have a duplicate, and I don't think it will be necessary.

A. I don't think you could duplicate this map. This is an ownership map of Greene County.

Q. Do you know—Judge Herndon, we could save a lot of time if you could tell me if this map is a substantial replica of the map you have in your hand. This is the Highway map of Greene County, Alabama? A. I would say there would be no real comparison since this is an ownership map.

Q. I mean geographically? A. The date on that map is 1950, and on this map is 1946, I believe. The County has not had a change in the county lines since that time. They would be the same on the county lines.

Judge Godbold: Does it matter whether they correspond with the map he has as long as the map you **[74]** have is a reasonably correct map of Greene County?

Mr. Jelinek: That is correct.

Judge Godbold: Would you establish that by him?

A. At what point?

Q. Geographical outline? A. It is substantially the same.

James D. Herndon—for Plaintiffs—Direct

Q. The red marks indicate the precinct lines? A. As shown on this map?

Q. That's right? A. I would have to say as shown on this map. It would be substantially the same, yes, sir.

Mr. Banks: I object, as shown on that map. I think the question should be as it is now.

Judge Godbold: Let's forget the map that the Judge has in his hand and see if we can establish it with the map you propose to offer in evidence.

Q. Are you familiar with the State Highway Department map? A. Yes.

Q. Is it substantially accurate in all things indicated on it? A. I wouldn't know about the Beat lines. The roads, [75] the sections, rivers and railroads, cities, communities, are the same.

Q. You don't know about the Beat lines? A. I do not know.

Mr. Jelinek: I am satisfied with that. I would like to offer this map into evidence. The red lines indicate the division by Beats. I would offer it at this time, subject to establishing the Beat lines.

Mr. Hall: We object to it as being offered in evidence now.

Judge Godbold: That is overruled.

(Plaintiff's Exhibit 10 received in evidence.)

Mr. Jelinek: While this is being identified, Section 21A, Title 30, Code of Alabama, indicates citizens over 65 are eligible to serve on a jury; however, they may decline. That is Section 21, Title 30. That is all we have.

I offer the vouchers.

James D. Herndon—for Plaintiffs—Direct

(Plaintiff's Exhibit 11 received in evidence.)

Mr. Jelinek: With Your Honor's permission, I think with the testimony of Mrs. Yarbrough, they could probably go back.

[76] Judge Godbold: How many vouchers are there? Two or fifty?

The Witness: About four.

Judge Godbold: If the vouchers cannot be released before closing of proceedings today, we will have an opportunity to make a photostat and substitute the photostat so that Judge Herndon can take them back with him.

The Defendants have any questions of Judge Herndon?

Mr. Hall: No, sir.

Judge Godbold: Can we excuse Judge Herndon?

Mr. Hall: Yes, sir.

Judge Godbold: You are excused.

(Witness excused.)

Judge Godbold: The court will be in recess until 1:15. Before we go in recess, the court is going to ask counsel to get together for fifteen or twenty minutes during the noon hour and see if by conference between you, you can eliminate some of the problems we have had this morning on verifying items, agreeing on items, and so forth, so that we can move them along; this is a judicial proceeding, and we are **[77]** all grown people, and we all know what the rules are, so see if you can obviate some of the problems of proof.

Mr. Jelinek: Is it possible to extend the recess for an additional thirty minutes? I think we could

Ralph S. Faulk—for Plaintiffs—Direct

save ourselves hours of time if we had some opportunity to discuss some of this.

Judge Godbold: Court will be in recess until 1:30.

(Noon recess.)

June 6, 1967

1:30 P.M.

AFTERNOON SESSION

Judge Godbold: All right, we are ready to resume, Mr. Jelinek.

Mr. Jelinek: I wonder if I could see a subpoena returned by the marshal regarding ex-Governor Wallace?

Judge Godbold: I have the file here. You will have to locate it in the file.

Mr. Jelinek: May I take a moment?

Judge Godbold: Yes, sir.

Mr. Jelinek: We call Mary C. Yarbrough.

I subpoenaed telephone books of the Telephone [78] Books from the Telephone Company. I wonder if I could have them.

I wonder if I could put this gentleman on for a few minutes?

Judge Godbold: Yes, sir.

RALPH S. FAULK, being duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jelinek:

Q. Would you tell us your name, please? A. Ralph S. Faulk.

Q. What is your—do you hold a position with the Southern Bell Telephone Company? A. Yes.

Ralph S. Faulk—for Plaintiffs—Cross

Q. And what is that position? A. Directory Sales Manager.

Q. Did you respond to a subpoena served on the Telephone Company? A. Yes.

Q. And a subpoena—the subpoena served on your company requested Telephone Books listing telephone numbers for the eleven precincts in Greene County? **[79]** A. Yes, sir.

Q. Do you have all of those books? A. I have all except one covering Mt. Pleasant, which is an independent company.

Q. These books cover all other precincts? A. Right, Demopolis and Eutaw.

Q. Are these duplicates? A. No, the year is different.

Q. Do these cover ten precincts? A. No, from the period of time that was stipulated up to the present, and that is all I have.

Q. This does cover ten precincts? A. I didn't count them, but you have the period you asked for.

Mr. Jelinek: Thank you very much.

The Witness: Am I dismissed, Judge?

Judge Godbold: Anything further from him?

Cross Examination by Mr. Bradley:

Q. Mr. Faulk, what area do these books cover? A. I couldn't answer that, sir. They cover the towns which are stipulated here with the exception of Mt. Pleasant, which is Aliceville, which is an independent **[80]** company. It is not Southern Bell and we have no directory for that, Pleasant Ridge, it is.

Q. Would not the Demopolis book you have cover other counties other than Greene County? A. Forkland which

Ralph S. Faulk—for Plaintiffs—Redirect

was mentioned in this subpoena is covered in the Demopolis Directory.

Q. Is it set out in there that Forkland subscribers are in Greene County? A. I have no knowledge of that.

Q. In looking at the Telephone Book, you could not tell what town those subscribers reside in? A. No.

I had to call our operator to determine which towns were handled. In most cases, we say which towns are covered on the front of the directory, this is Eutaw, Boli-gee, and York; these are the primary cities covered by the Directory.

Q. Would the Eutaw portion cover some area in another County other than Greene County? A. I have no knowledge of that.

Mr. Bradley: May it please the court, we object to that, because it doesn't show all of these names are names of people in Greene County, or that the [81] particular subscribers that are supposed to be residents of Greene County are residents of Greene County. I don't believe there is any clear delineation showing these people are residents of Greene County, and not some adjoining county.

Judge Godbold: That is overruled; that goes to the weight of it rather than the admissibility; Mr. Bradley, I overrule.

Mr. Jelinek: I would like to ask a couple of questions, if I may.

Redirect Examination by Mr. Jelinek:

Q. In the Demopolis, is this the book that had Forkland in it? A. Yes.

Ralph S. Faulk—for Plaintiffs—Redirect

Q. There is nothing in here that would indicate it is Forkland; is that correct? A. As far as I know.

Q. If you were reading this book, looking for a Forkland name, you couldn't necessarily find it by anything written in the phone book? A. No.

Q. Is there any way of identifying the name of Negro women by looking at the Telephone Book, Negro women as [82] opposed to white women? A. May I say our Department which I represent, we work from service orders which are issued by a local business office, and I haven't any knowledge of how the procedure is for that; we compile what actually is sent to us on service orders, and from there we see that they are gotten in the directory.

Q. Are you aware of your own knowledge that the names of white women are listed as Miss and Mrs., while the names of Negro women are listed by their first name? A. I have no knowledge.

Mr. Jelinek: I offer these books in evidence.

(Plaintiff's Exhibits 12, 13, 14 and 15 received in evidence.)

Mr. Jelinek: That is all I have.

Judge Godbold: Anything else from this gentleman?

Mr. Bradley: No, sir.

Judge Godbold: You may be excused.

(Witness excused.)

Mr. Jelinek: Is Mr. Cook, the tax assessor [83] here?

Mr. Banks: I have a letter from the doctor saying that Mr. Cook's health was such that he could not attend.

Colloquy

Judge Grooms: There is a Doctor's Certificate for Mr. Cook, and the money has been turned in.

Mr. Jelinek: What about the documents?

Mr. Banks: The Board is meeting in Greene County as required by law, and it is necessary they have those books.

We have the '65 book.

Judge Godbold: Here is the Doctor's Certificate on Mr. Cook, Mr. Jelinek.

Mr. Jelinek: Yes, sir.

Judge Godbold: What do you propose to prove by Mr. Cook?

Mr. Jelinek: The Telephone Books and Tax Assessor's books are required to be gone over for the jury rolls. I didn't serve the subpoena on him personally, just the subpoena duces tecum.

Judge Godbold: What book did you suggest?

Mr. Jelinek: The book for August, 1966.

Judge Godbold: What is produced?

[84] Mr. Banks: This is an abstract for the year 1965.

Judge Godbold: What is the difference between the abstract and the list?

Mr. Banks: The lists are made from the taxpayer's book.

Judge Godbold: That is an abstract from the list.

Mr. Bradley: That is for the tax year 1965. The tax year, 1966, I don't believe is available right now.

Judge Godbold:—Let Mr. Jelinek examine that and see if it will meet with the requirements.

Mr. Jelinek: Sheriff Lee.

William Lee—for Plaintiffs—Direct

WILLIAM LEE, being duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jelinek:

Q. You are Sheriff William Lee? A. Yes, sir.

Q. Sheriff of Greene County? A. Yes, sir.

Q. Pursuant to subpoena, have you brought any documents? [85] A. I am not custodian of the jury list.

Q. We did not ask for the jury list.

After the Jury Commission, or after the Judge chooses those who shall sit on the venire, are you given some document to serve on the people who ought to appear? A. Yes, sir.

Q. What is that document called? A. It is a jury list.

Q. And is it also a summons? A. No, sir; that is a jury list.

Q. You are given a copy of the list to be served on them? A. To be served.

Q. And it says something you are compelled to serve on a certain day; is that the idea? A. Yes.

Q. After you serve it, do you make any record of the service? A. No, sir.

Q. Do you keep any records of who was served? A. No, sir.

[86] Q. Do you have any records of who appeared? A. No.

Q. Do you return something to the jury commission? A. No, sir.

Q. Do you indicate to them in any way that service which has been made? A. No, sir.

Q. In other words, they don't know if the service has been made? A. No, sir.

Mary C. Yarborough—for Plaintiffs—Direct

Q. They find out for the first time on the date when they are due to appear? A. Yes, sir.

Q. Has there ever come a time on that date when people are due to appear that someone does not come up? A. Yes, sir.

Q. Have you been notified in some way? A. I know they are not coming.

Q. Do you then so state on that day of the term? A. Yes.

Q. And you keep no records of this at all? A. No.

[87] Mr. Jelinek: No further questions, thank you.

Mr. Bradley: No questions.

The Witness: May I go.

Judge Godbold: Can Sheriff Lee be released?

Mr. Jelinek: Yes, sir.

(Witness excused.)

Mr. Jelinek: Mrs. Yarborough.

MARY C. YARBOROUGH, called as a witness, being duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jelinek:

Q. Mrs. Yarborough, you are Clerk of the Jury Commission; is that correct? A. Yes, sir, that is correct.

Q. And you have been the clerk for some twelve years; is that right? A. Approximately.

Q. And you are elected as Circuit Clerk? A. That is correct.

Q. And as Circuit Clerk, you keep the Conviction Record; is that correct? **[88]** A. Yes.

Mary C. Yarborough—for Plaintiffs—Direct

Q. But not as Jury Commission Clerk? A. But not as Jury Commission Clerk.

Q. But as an elected official of the Circuit Court, you are then, in counties of a certain size, automatically clerk of the Jury Commission? A. I believe so.

Q. Now, who is presently on the Jury Commission? A. Mr. Melvin Durette, Mr. W. M. Steele, has taken Mr. Morrow's place, and Mr. Albert Gray.

Q. Mr. Steele, he was recently appointed, I assume? A. Sometime about—sometime ago.

Q. Now, are the members on the Jury Commission, is it correct to state that since you have been clerk, that all of the members of the Jury Commission have been of the white race? A. They have.

Q. They have? A. Yes; they have.

Q. And you yourself are of the white race? A. Yes.

Judge Godbold: Has there been any substitution of parties in the change in Commissioners?

[89] Mr. Jelinek: No, sir. This is the first I learned of that.

Judge Godbold: Who is off now?

Mr. Jelinek: Mr. Morrow is off and Mr. W. M. Steele is on.

Judge Grooms: S-T-E-E-L?

A. S-T-E-E-L-E.

Judge Godbold: Do you propose to substitute?

Mr. Jelinek: I am not sure, Your Honor, that substitution would now be proper; perhaps an addition, because I refer to these specific jury commission members as having committed an act during

Mary C. Yarborough—for Plaintiffs—Direct

their time. I couldn't substitute a new person any more than I could a new Governor for the ex-Governor. Perhaps if I had added them as parties, it would work.

Judge Godbold: It would be hard to get service on a person at this time because he has a right to be at the hearing.

Mr. Jelinek: Conceivably his counsel would agree to that.

Judge Godbold: I have my doubts.

Q. In your duties as Clerk of the Jury Commission, one of them is to assist Members of the Jury Commission [90] to compile lists of those potentially eligible and submit it to them for their judgment; is that correct? A. Insofar as it goes, it is.

Q. Is there more? A. Well, they bring in lists of their own in addition to the names that I have. I go out into the Beats of the County, get names, use a voter's list, use a telephone directory and those things are on hand in my office, but the members of the Commission themselves also bring in names.

Q. So you assist them, but they do some of the job also; is that correct? A. I would say they did all the job except for typing the cards.

Q. Now, is it not true that part of your job, according to the Alabama Code, Section 18, is to obtain the names of all males over the age of 21 years of age? A. I am not familiar with that section of the Code. I won't argue it.

Q. Do you remember the deposition—do you remember when I examined you under oath? [91] A. Yes.

Q. Do you remember we discussed— A. I believe we read the Code at the time.

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Q. That is right.

Now, is it not a fair statement that in fact, the statute requires you to obtain a list, let's say that we know at least as of 1960, there were over 2,000 Negroes in Greene County?

Mr. Jelinek: May I note for the court, if you will, the census refers to non-white of 2,247, four are Indians.

Mr. Banks: I object to that statement of Mr. Jelinek. He said 1966. It is 1960.

Mr. Jelinek: Of that number four are Indians, the rest are Negro.

Q. Of that 2,000 odd whites, is it not your job under the statute which we read sometime ago, to compile a list of those over the age of 21 years of age to submit to the Jury Commission for them to pass judgment on, whether they are eligible? A. To the best of my ability, it is.

Q. Have you ever, as of August 16th—is that when the jury commission met to pick the Grand Jury which [92] was involved in the Bokulich case? A. I guess that is when it was. I don't remember exactly when it was.

Q. I am going to address all of my questions to that date and before.

I am aware that there have been additional work since then, but we will discuss up to that time and before for the time being.

At that time, prior to that date, during all of those years on the jury Commission, had you ever compiled a list of those over 21 years for the Jury Commission?

A. Well, there would be no way for me to get the names

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of all males, whether they were white or Negro, who were older, over the age of 21 years of age, in the County.

Q. Did you try to do it? A. Mr. Jelinek, I tried as much as I could. I have my duties as Circuit Clerk in addition to Clerk of the Jury Commission.

Q. And that interferes with your time needed to do this job; is that right? A. It does, but I think we have done a pretty good [93] job; we have gotten out into the county, we have contacted people from all the Beats, both Negro and white, and I think we have gotten a pretty good idea of the number of folks, black and white, but I am sure that there are some who have been missed.

Q. Many, as a matter of fact, wouldn't you say? A. I don't know.

Q. Now, answer to the question not as whether you were able to compile the whole list which surely is a difficult job, have you ever prepared any list under the statute, a list under Section 21, which says the Clerk shall prepare a list of the names of every male citizen over 21 and under 65 and so forth; have you ever prepared such a list? A. No, not of every male.

Q. Have you ever prepared a list of any? A. Yes.

Q. All right. A. I have prepared lists everytime the Jury Commission has met, but not of every citizen in Greene County.

Q. Did you bring with you any such list? A. Yes, sir; I did.

[94] Q. Could I see the list? A. Those papers are over there, Mr. Bradley, if you would bring them to me.

Here is the last list that I gave the Jury Commission: it is the only one I have with me, and the only one I have kept. We don't keep them; when the name is placed in the Jury Box, there is no need to keep it; these are names given to me by people, residents of the County.

Mary C. Yarborough—for Plaintiffs—Direct

Q. Is this by any chance after August 16, 1966? A. Yes, it would be. It would be when we were putting them on the jury; August, 1966, list I would not have.

Q. Is that after you were served with the papers in this case, Mrs. Yarborough? A. No, this was prepared at the time the Jury Commission met in November, I believe it was November that they met.

Q. You were served with the papers in this case in September? A. I was served with the papers in this case just a few days ago.

Q. I am sorry, the initial paper that started the [95] case, the summons and complaint that made the original allegations that began the case. Do you remember receiving that? A. I remember you coming down and taking the deposition; I don't remember being served in regard to it, however.

Mr. Jelinek: I wonder if I could have a copy of the complaint, the court's copy?

A. The last jury list I would have prepared prior to this list would have been in August, 1966.

Q. Do you remember receiving something like this? A. I feel sure I did.

Q. And the date here says filed in the Clerk's office September 9, 1966? A. I don't remember it at all, but if you say so, all right.

Q. Was the list that you prepared, the list that you showed us, that was prepared after that date; is that right? A. The list I just showed you was prepared after that date. The list that we have used in the past, the only thing that we have kept have been letters in regard to recommendations; the lists that we had, we [96] did not

Mary C. Yarborough—for Plaintiffs—Direct

keep. Those names had been put in the jury box. There was no need to keep them.

Q. These lists that you put into the box, and that you didn't keep, these are lists that people gave you; is that right? A. Not all of them, part of them were lists that people gave; part of them were people that I took a voting list, went through, checked, used the telephone book, and used other means to compile the list. The members of the Jury Commission also brought lists, but we did not see fit to keep any of those things until now.

Q. After you were served with these papers, right? A. Yes.

Q. Back to the original question. Did you ever prepare a list of over fifty names of every male citizen? A. Mr. Jelinek, I have never counted names. I would say that some of the lists certainly had more than a hundred names.

Q. Over a hundred? A. I don't know.

Q. Certainly not over 500? A. No, I wouldn't.

[97] Not until this last time.

Q. So, in fact, you went into the County and you came back with names that you believed were people who were eligible; is that right? A. That's right.

Q. You went into the precincts? A. That's right.

Q. Now, did you go—do you set aside any days to do this full time? A. No, I don't.

I go more or less at my own convenience.

Q. And, in fact, you don't go, you don't set aside full days for it, you do it in the course of other duties; is that right? A. Yes, and real often it is on Thursday afternoon when you have an afternoon off.

Q. The law permits you to be paid when you go out? A. I am not paid for that.

Mary C. Yarborough—for Plaintiffs—Direct

Q. I say the law permits you to do—to be paid; is that correct? A. No, sir; I don't believe it does. I don't know.

Mr. Jelinek: Will counsel stipulate that the law so provides?

[98] Mr. Banks: No, it does not.

Mr. Jelinek: I will demonstrate that later.

Q. In fact, you never took any payment for going out; is that right? A. No, I have never taken any payment for going out, because it was not for a full day, and I haven't taken that since I was on the Commission basis; I haven't even turned in days I meet with the Commission, but I never took the days.

Q. Did you ever bring back names of people that you feel are not eligible, although they are over 21? A. It is not a question of what I feel, Mr. Jelinek.

Q. Could you answer that yes or no. Did you ever bring back names of people who you felt were not eligible, although they are over 21? A. Names have been given me who had criminal convictions; in this case, where people have been convicted of a felony, when I submit the names to a jury commission, I tell them that a felony has been committed by this person.

Q. Other than that, you take back every name you get? A. I do.

[99] Q. Now, in 1966—do you know how many Negroes were on the jury roll in 1966? A. No.

Q. Did your counsel advise you of the letter I sent to them requesting you to make such a compilation? A. You mean the letter you wrote a short time ago?

Q. That's right. A. Mr. Durrett did that, but that was not 1966, that was '67.

Mary C. Yarborough—for Plaintiffs—Direct

Q. You did not do it for 1966? A. No; I didn't know that was what you wanted. I thought you wanted the last one.

Q. In 1966, testimony has been given that we have some eighteen Negro names out of a jury roll of 471. Would you comment on that? A. Mr. Jelinek, I have no idea, and there were numerous people when Mr. Durette and I went over the jury roll, whether they were black or white, and I could not begin to tell you whether the figures which you have up there are right or wrong.

Q. Out of the names on the jury roll you compiled, the many ways, one of them is from Telephone Books; is that right? [100] A. Yes. That Demopolis Telephone Book is not a Eutaw Directory, and we have no access to it.

Q. Are you aware that the statute directs you to consult Telephone Books as a means? A. I think it may, I don't know.

Q. Did you use Telephone Books to get the information? A. I used the ones in my office.

Q. Was it one of these books? A. We would have used—well, no, sir, we made up the list in January, and that is February, 1967.

Q. In 1967, I know you have a list? A. The list was made in January, and the book was issued in February.

Q. We are talking about now, August 16, 1966? A. Then this is the Telephone Book which we would have used.

Q. Did you use that book? A. Yes, or one similar.

Q. Did you go through the names of this book looking for eligible jurors? A. I did.

Judge Godbold: What book are you talking about?

[101] Mr. Jelinek: Plaintiff's Exhibit 14.

Mary C. Yarborough—for Plaintiffs—Direct

Q. Are you aware of names of Negroes in Greene County, are you acquainted with many Negroes? A. With some of them.

Q. Would you say many or few? A. I wouldn't say a large number, but a good many.

Q. Now, do you attend any social functions with Negroes? A. No; I don't.

Q. Do you attend church with Negroes? A. No, sir, I don't.

Q. Do you belong to any organization that contains Negroes? A. I don't belong to any organizations.

Q. Do you have Negroes as house guests in your home? A. No, sir; I don't.

Q. Would you say it is a fair statement your acquaintanceship with Negroes is somewhat limited? A. I don't know.

Q. O.K.

Now, in this book, are you aware of someone named Willie Lee Gibson? A. I have heard the name.

[102] Q. Do you know whether he is in the book? A. No, sir, I don't.

Q. Would you take a look? A. Gibson, did you say?

Q. I—

Judge Godbold: Willie Lee Gibson?

A. No; there is a Hanna B. Gibson and a Rossie Mae Gibson, but I don't see a Willie Lee Gibson. Do you?

Q. No, in fact, I don't.

Do you know Leo Bibbs; do you know a Leo Bibbs? A. I know Leo Bibbs by name.

Q. Let's see if we can find a return then on this. A. Does he live in Eutaw or Boligee?

Mary C. Yarborough—for Plaintiffs—Direct

Q. Boligee? A. Yes, his name is here.

Q. Do you know that he is illiterate? A. I don't know anything about him.

I just said his name was familiar to me.

Q. Do you know he is Negro? A. Yes, I think—well, I am sure I did know that. We had him in Court one time, I don't remember whether it was civil or criminal.

Q. Now, did you, when you went through this list—**[103]** this Telephone Book, did you spot his name? A. I don't remember.

Q. Did you check to see if he was an eligible juror? A. I don't remember.

Q. Am I correct that he is not on the list? A. I don't know, Mr. Jelinek.

Q. I will state he is not on the list, and that can be substantiated.

Mr. Boggs: I object and move to exclude the statement.

Judge Godbold: Go ahead, the jury list is in evidence.

Q. I show you Archie Campbell; are you aware of him? A. No.

Q. You don't know if he is a Negro or not? A. No.

Q. When you saw his name, did you check to see if he was on any conviction list? A. We always check to see if names are on conviction lists.

Q. Let's assume he wasn't on a conviction list, which is also—by the way, did I ever introduce that **[104]** into evidence?

Mr. Jelinek: I think we stopped in between when we were about to introduce the conviction list. I

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think Your Honor had accepted it and I digressed. I would like to offer this now.

(Plaintiff's Exhibit 16 received in evidence.)

A. Could I see that, please?

I can't tell whether this is the list I sent him or not. He has put it in alphabetical order.

Judge Godbold: Do you have any objection to it?

Mr. Bradley: Judge, we have no way of knowing whether this is it. This witness prepared a list and furnished it to Mr. Jelinek from her records. That list we are perfectly willing to admit as being the names of people—

Judge Godbold: Do you have the list she prepared for you?

Mr. Jelinek: I don't have it handy, but if they will produce the conviction book record, that will be the original record, and that will end this.

Judge Godbold: Has the conviction record been subpoenaed?

[105] Mr. Jelinek: Yes. This is the question.

We subpoenaed the book not as Circuit Clerk, but as Clerk of the Commission as opposed to Clerk of the Circuit Court. This list is here, and that is why I did not bring the other; I assume the original list would be here to substantiate it.

Judge Godbold: Mr. Jelinek, the Court is going to admit into evidence the list which you just tendered, which I believe from your statement this morning, you stated it is in alphabetical order and made from the docket by you, and the non-alphabetical list previously made by Mrs. Yarborough?

Mr. Jelinek: Yes, sir.

Mary C. Yarbrough—for Plaintiffs—Direct

Judge Godbold: It is admitted into evidence, conditionally that you file with the court within five days a copy which Mrs. Yarbrough gave you. If the defendants then want to compare the list and indicate to the court any objection in accuracy, they can do it.

If no objections are filed, we will take it as having been accurate.

Q. We were talking about Archie Campbell? A. I don't know him.

[106] Q. Now, I ask you if it is your policy to check a name like Archie Campbell in the conviction list? A. Yes, it would be.

Q. Assuming he was not on the conviction list, do you take it a step further? Do you check to see if he is literate, do you check his reputation in the community? A. Those things are checked by people who help with the list.

Q. Who, for example, Members of the Commission? A. Members of the Commission and names that are submitted.

Q. You did not do it; is that correct? A. I have nothing to do with the names that go into the Jury Box.

Q. You didn't check it out? Your job is to prepare a list of those eligible over 21? A. Yes.

Q. Did you add that to any list for the Jury Commission to consider? A. I don't remember doing so.

Q. If I told you this man reads English, has no criminal record, and is registered to vote, could you **[107]** explain why his name is not on the jury roll? A. Not unless someone is on the Jury Commission, or someone had been discussed with as we do, his reputation was bad or he was illiterate.

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Q. Is there any document that would indicate his name was ever submitted to the Jury Commission? A. No, there is not.

Q. Was his name ever put on a list? A. I do not know.

Q. You know if you prepared a list with his name? A. Mr. Jelinek, when you work with names all day, you don't remember what names you put on.

Q. You don't remember that name? Let me ask you about B. T. O'Neal under the Boligee book? A. Is that Booker T. O'Neal?

Q. As a matter of fact, it is. A. Well, he had been convicted.

Q. Do you know what he has been convicted of? A. I believe it was whiskey, it was a number of years ago, but I am not sure; I do remember we had him up in Criminal court.

Q. Now, if his name is not on the conviction list from 1956 until 1966, would that indicate he wasn't [108] convicted? A. Not necessarily, because those records go back for years.

Q. You mean he might have been convicted more than ten years ago? A. He could have been convicted in 1949.

Q. Does the fact that he is a Registered Voter have any effect; would that influence you in any way? A. It helps in getting his name before the Jury Commission and other people.

Q. Let's assume that this gentleman can read and write, he is registered to vote, and perhaps he was convicted of a liquor offense over ten years ago; would you submit his name as someone for the Jury Commission to consider? A. I haven't thought of it at all.

Q. You haven't given that any thought? A. No; I haven't.

Q. Now, do you know if he is a minister? A. I don't know.

Mary C. Yarborough—for Plaintiffs—Direct

Q. Are you acquainted with Negro Ministers? A. No, I am not.

Q. Do you ever go to Negro Churches seeking out names? **[109]** A. No.

Q. Negro Fraternal Organization? A. I don't go to white ones either, Mr. Jelinek.

Q. But I don't go to white ones either; you don't go to Negro ones either, do you? A. I don't go to Negro or white churches.

Q. I understand, Mrs. Yarbrough, you want to make some points while you are testifying—

Judge Godbold: Mr. Jelinek, if there is going to be any admonition of the witness, the court will give it.

Mr. Jelinek: Will you ask the witness to answer.

Judge Godbold: I think the answer was responsive.

Q. I asked you the same questions about Courtney Porter? A. I don't know anything about Courtney Porter.

Q. Did you check anything about Courtney Porter? A. I have checked all the names in the voting list and the telephone book with the Jury Commission, and most of them in there with other people. I can't tell you why these names are not here.

[110] Q. Of other people? A. People I have written and asked and have to see, and asked to give me names of responsible people to go in the jury box.

Q. Did you ask them if Mr. Porter is qualified? A. Well, when I was in Boligee, I went through the Boligee Telephone Book with Mrs. Russell and she gave me the names

Mary C. Yarborough—for Plaintiffs—Direct

of people she thought were qualified. I did the same thing with Mr. Cameron.

Q. When you testified in August, you told me then the only person you discussed Negro names with was Professor Young? A. No; I didn't tell you that.

Q. Let me show you your testimony on page 26. A. In my deposition it shows discussion with Archie Brown.

Q. I am talking about in Boligee. A. I should have added Professor Young.

Q. That is your recollection now? A. It would be my recollection at the time because they have both helped me from time to time and have helped the jury commission.

Q. Your recollection now is correct, and your recollection [111] then was incorrect; is that right? A. That's right.

Q. Let's go on to the Tax Assessor's list? A. I will tell you right now I haven't used the Tax Assessor's list.

Q. You have not used it? A. No; I have not.

Q. In other words, you have used the Voters Registration List; is that right? A. That is right.

Mr. Jelinek: Now, I would like to have these papers marked for identification, if I may.

(Plaintiff's Exhibit 17 marked for identification.)

Mr. Boggs: That is not introduced into evidence. It is just for identification.

Mr. Jelinek: That's right.

Q. Now, I show you a list of 403 Negro names of people who read English, have no criminal conviction, and are registered to vote, and I ask you to explain why none of these were not picked out by you for registration?

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Mr. Hall: We object to that testimony; there is [112] no testimony those are Negroes and no way for us to know whether they are or not.

Mr. Jelinek: Subject to proving it.

Judge Godbold: I think he can be interrogated about the names on the list.

Whether they are Negroes, can read, write, and are registered voters are matters that have to be proved later.

With that qualification, she can be examined about the names.

Q. As to the names—I think you were about to say something? A. I was about to say I see one name who has served on the jury several times, Sherman Norwood, Jr.

Q. Do you see any others? A. Sinis Gandy. I know he has served on the jury and Nelson Smith, I know has served on the jury, Johnny Hurter has served on the jury.

Q. You will find of the 82 Negroes in '66, you will find 25 percent, maybe, on that list—

Mr. Boggs: We object to what he finds, may it please the court.

Judge, we object.

[113] Judge Godbold: I think it will be helpful if you just ask the questions, Mr. Jelinek.

Q. Let's go down the list for example.

The first name is Louis Amerson, Jr. Are you familiar with him? A. No; I am not.

Q. Are you aware he reads English? A. No; I am not.

Q. That he has no criminal conviction? A. No.

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Q. That he is a registered voter? A. If his name was on the voting list, then I was aware of that fact; as to whether he was literate or not, I do not know; I do not know him.

Judge Grooms: Is this the voting list?

Mr. Jelinek: No, sir, it is not.

Q. If I asked you the same questions for Jessie Brown, who has twelve years of education— A. I do not know Jessie Brown.

Q. Your answers would be the same? A. Yes.

Q. If I asked the same questions for James Davis who has eleven years of education, would your answer be **[114]** the same?

Judge Godbold: We don't know how much education they have and this is a matter of proof; you can ask her about names, but not your comment what the list stands for. It has not been identified, and it is not in evidence, and has not been proved.

Q. I ask you about Harkness from Eutaw.

Did you consider his name? A. I do not know.

Q. Is it possible, Mrs. Yarborough, there could have been some 350 or more names of people who read English, who have no criminal convictions, and who are registered to vote and yet who are not on the Jury Roll? A. I don't know.

Q. When you go into the County, Mrs. Yarborough, you go from precinct to precinct; is that right? A. That is right.

Q. And you go in your spare time when you have the time? A. That's right.

Mary C. Yarborough—for Plaintiffs—Direct

Q. And you have eleven precincts? A. I believe that's right.

Q. Now, is it correct for example in Clinton, to get [115] to the August, 1966 roll, you spoke to four people to obtain names? A. I don't remember how many people I specifically spoke to.

Q. Let me refer you to your deposition where you testified you spoke to Mr. King, white land owner, Melvin Porter, white postmaster, Howard Brown, Negro Deputy Sheriff, and Brent Crawford. Does that refresh your recollection? A. I have talked to all of those people.

Q. And you testified then, or your testimony then was that was all the names you could remember speaking to in Clinton? A. It was at the time, I am sure.

Q. Is that also true now? A. No. I wrote Tom Giles to get names when we were recompiling the jury roll. I—he is a Negro.

Q. You spoke to Brent Crawford.

Are you aware that Brent Crawford has been on the jury five times in the last six years? A. No.

Q. Do you know if this is so? A. No, sir, I don't know.

[116] Q. Do you know if it is so he has been on five specific years, successive years, within six years? A. I couldn't tell you; I have never counted the times.

Q. But he is one Negro you spoke to? A. Yes; he is.

Q. Now, on these lists, you have got some names from people who gave you suggested names; is that right? A. That's right.

Q. And on the list you took some 37 names that were proposed to you; is that correct? A. I do not have the figures on that, Mr. Jelinek, I have no idea.

Q. I show you this list of names that were on the '66 list that were not on the '65 list and ask you if this refreshes your recollection in any way?

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Judge Godbold: Has that list been identified or proven in any way, Mr. Jelinek?

Mr. Jelinek: These lists are part of the Court's record, Your Honor. Already you have a list of those in 1966 and 1965. This is merely a compilation.

Judge Grooms: Made by whom?

[117] Mr. Jelinek: By myself. The evidence is before the Court already.

A. If I might make a statement in regard to these lists.

Quite often you come up with duplication of names, and you are given names of people who are already serving on the jury, and maybe three or four people will get the name of the same person.

Q. Sure. A. But I haven't checked on this. I don't know whether it is right or isn't right, it could be. I have never had time to sit down and read the jury rolls from year to year.

Mr. Jelinek: We offer this list into evidence, Your Honor.

Mr. Hall: We object, it is not properly identified.

Mr. Jelinek: For identification, because the evidence is before the court.

(Plaintiff's Exhibit 18 for identification marked:)

Q. Now, Mrs. Yarbrough, on these 37 names, 32 of **[118]** them, meaning all but five, came from the list of people who you asked to submit names to you?

Mr. Boggs: We object. How does she know?

Judge Godbold: Is that in evidence, Mr. Jelinek?

Mr. Jelinek: No. I will withdraw the question.

Mary C. Yarborough—for Plaintiffs—Direct

Q. Did you produce the list presented to you by people suggesting names of Negroes for the jury roll? A. I did.

Q. May I have those. A. (Handing document to counsel.)

Q. Are these the lists you presented to me during the deposition? A. Some of them are, and some of them are lists that have been compiled since the last time the jury commission met.

Q. All right.

Once again let me restrict all of our questions to those events which took place before August? A. I am not sure I can tell which was which. This one was since then.

Q. If I show you the Xerox, would you tell me these are the ones you presented to me at the time of your deposition?

[119] Judge Godbold: Were they put in evidence at the time the deposition was taken?

Mr. Jelinek: Yes, they were.

Judge Godbold: The depositions are in evidence. Why don't we use that.

Mr. Jelinek: I think, for clarification, Mrs. Yarborough may have some additional ones now.

A. If you have all the others, and you don't want the additional ones—

Q. These are all you had at that time? A. Yes.

Mr. Jelinek: Should I offer them in evidence, Your Honor, or should we consider them in evidence from the deposition?

Judge Godbold: Were they attached to the deposition?

Mary C. Yarborough—for Plaintiffs—Direct

The depositions are in, which would put in evidence all exhibits which came in when you took the deposition. There is no use putting in any additional copies.

Mr. Jelinek: This is not physically part of the record then.

Judge Godbold: Let's go back. I understood [120] from what you said those documents were put in evidence as exhibits to the deposition.

Mr. Jelinek: They were marked in evidence, but not placed in the books.

Judge Godbold: Where are they?

Mr. Jelinek: They are in Mrs. Yarborough's hand, and I have Xerox copies of them.

Judge Godbold: You had better proceed.

Mr. Jelinek: I offer those in evidence.

Mr. Boggs: We object.

They haven't been proved yet, if they are not in evidence with the deposition.

Judge Godbold: I understand Mrs. Yarborough has testified those are copies of the list which she identified at the time the deposition was taken.

A. Let me look through the whole thing to be sure. It was my understanding that these were copies of the things that had been introduced into evidence; I don't know why all of these things are circled and have lines drawn through them.

Mr. Jelinek: I should add we have done the circling and underlining. That was not part of the exhibits. Those are our circles and underlining.

[121] A. I think they are all right.

Mary C. Yarborough—for Plaintiffs—Direct

Mr. Boggs: That doesn't cover all of them, just a portion of them.

A. Covered what I happened to have in the office, a few things which we had kept in and not thrown out.

Judge Godbold: Those you can identify as lists, you testified to these lists when your deposition was taken?

A. Yes, sir; that is right.

Judge Godbold: They will be admitted in evidence.

Mr. Boggs: But there interlineations—

Judge Godbold: That has already been covered, Mr. Boggs.

(Plaintiff's Exhibit 19 received in evidence.)

Q. Back to the question.

From this list we have compiled the fact that of the names that were added to the '66 list from the '65 list, of the 37 names, 32 came from this list? A. I don't know, Mr. Jelinek. That is what you said.

Q. Can you explain how those that you and three other members of the Jury Commission could only add five additional Negro names for the entire Greene County [122] in a year of looking for eligible Negro males? A. I have nothing to do how names go in the jury box. The Jury Commission, I am sure, put in names of Negroes they felt were eligible.

Judge Godbold: The question is subject to proving it and tying it in later. We will have to tie it

Mary C. Yarbrough—for Plaintiffs—Direct

in later and prove there were five.

Mr. Jelinek: That is before the court.

Mr. Bradley: I—

Judge Godbold: Not before us in any form we can see it or understand it.

Mr. Jelinek: The Court has the jury roll for 1966.

Judge Godbold: That is correct, and we took this hypothetically subject to the evidence tying it together. I am simply stating to Mr. Boggs and all here we do not accept your statement there are five.

Mr. Jelinek: There is nothing else we can offer. It is before the court.

Judge Godbold: I think it would help if you would phrase your questions hypothetically, and that would save them some anxieties.

Q. You maintain you don't choose any Negroes for [123] the Jury Roll, that is correct, is it not? A. I don't choose any Negroes or white people for the Jury Roll.

Q. All you do is submit a list of eligibles; is that right? A. Not necessarily of eligibles.

Q. Pardon me? A. Not necessarily eligibles.

Q. Of people over 21? A. Right.

Q. Now, let's assume, Mrs Yarbrough, there are over 2,000 Negro males over 21, and you were compiling your list for the Jury Commission of those over 21 years and under 65, did you compile a list of more than 200 names?

A. I told you, Mr. Jelinek, I don't know how many names.

Q. You don't have your list? A. No, sir; I certainly don't.

Q. Did you destroy them? A. Yes. They were destroyed at the time.

Q. You then went into your next precinct which is Forkland; is that right? [124] A. Yes, it could be.

Mary C. Yarborough—for Plaintiffs—Direct

Q. In Forkland—now, is it a correct statement that you don't know any of the Ministers in Clinton, or School Teachers either? A. I don't know whether I do or not; I would have to know the names in order to know whether I knew them or not, but I don't really think I know any of the Negro Ministers, I don't to my knowledge.

Q. Would that be a good source to get Negro names in Clinton? A. I wouldn't say so.

Q. You don't think a Negro Minister would know the names of those over 21, educated, no convictions, high moral character, you don't think that would be a good choice? A. Not necessarily.

Q. What about your school teachers. Your statement was you don't know the Negro School Teachers in Clinton; is that right? A. I did not contact any Negro School Teachers in Clinton.

Q. Your statement was you don't know— A. I don't think I know any of the Ministers or [125] School Teacher.

Q. Do you think a Negro School Teacher would be a good source of Negroes who had educations, were of high moral character? A. They have been very helpful.

Q. You did not contact them? A. I don't know who is a School Teacher.

Q. What? A. I don't know.

Q. Is that hard to find out? A. I don't know whether anybody in this room knows whether there is a Negro School in Clinton or not. If there is, I don't know about it. There are very few schools in the county.

Q. Now, you stated also—

I don't know the Negroes in Clinton, Mr. Jelinek, is that a correct statement? A. For the most part, I don't. I do know a few.

Q. Let's move to Forkland.

Mary C. Yarborough—for Plaintiffs—Direct

Judge Godbold: Was the increase of five that was discussed a few minutes ago, what area did that cover, was that in Clinton, or of the list for the whole county?

[126] Mr. Jelinek: The entire County, and not this witness only, but the entire Jury Commission?

Mr. Boggs: What year?

Mr. Jelinek: 1966.

Judge Grooms: There were 1300 something registered in the Fall of 1965 in one month?

Mr. Jelinek: That's right.

The Court: Maybe there wasn't any left.

Mr. Jelinek: We are talking about the difference in the names. In 1965, we had 429 on the Jury Roll. In 1966 we had 471. In fact, 37 Negroes were added, and of the 37, we have stated only 32 came from lists submitted by other people. And only five names came from the entire Jury Commission.

Judge Grooms: I beg your pardon. I was confused about the five on the voting list.

Mr. Jelinek: I am sorry. It was unrelated to the voting list.

Q. In Forkland you spoke to, according to your testimony, one person, Mr. Barton; is that correct? A. Yes, sir.

Q. Mr. Barton is white; is that correct? A. Yes.

[127] Q. Mr. Barton is a former member of the Jury Commission? A. Yes, sir.

Q. He was doing years ago what you are doing now? A. He was doing this up until about a year ago.

Q. You made a statement you don't know any Negroes there of your own knowledge; is that correct? A. Well, a few of the bootleggers we have had from time to time.

Mary C. Yarborough—for Plaintiffs—Direct

Q. You do know the names of Negroes who have been convicted of crimes and aren't eligible? A. Yes. I know more of them than others.

Q. You don't know any other respectable Negroes who have been educated and who are respectable, and are registered to vote and have twelve years of education? A. I don't believe I do know; no, sir.

Q. Your next Precinct is Eutaw where you live and work; is that right? A. Yes, sir.

Q. You testified you spoke to Howard Brown; is that right? A. Howard is the Deputy Sheriff.

[128] Q. That is the same man you spoke to for Clinton; is that right? A. With Howard I discussed the entire county, because he is familiar with the Negroes from one end of the County to the other.

Q. He is a major source, and has been appointed by Sheriff Lee; is that right? A. That's right.

Q. Now, you spoke to Mr. Crawford, is that Boyd Crawford? A. That's right; I don't know if that was Boyd or Alex or Thomas. I have spoken to all of them from time to time.

Q. And you spoke to Velma Cherry, who used to work for you? A. She is a cook at the Hospital and is a graduate of Tuskegee, and she is a cook, and isn't something to look down your nose at.

Q. And Mrs. Brown? A. Yes.

Q. These are the people you spoke to in Eutaw; is that right? A. Probably.

[129] Q. You didn't go out and knock on any doors. Did you speak to any of the ministers in Eutaw? A. No, sir; I did not.

Q. Did you—do you know Rev. Gilmore? A. I have seen him.

Mary C. Yarborough—for Plaintiffs—Direct

Q. Do you know he is a candidate for Sheriff? A. Yes.

Q. All right. A. I gave him some absentee ballot applications.

Q. Good.

Did you ever ask him for any names? A. No, I did not.

Q. You don't have his name on the list, as a matter of fact, either? A. I don't know whether his name is on the list or not, I have never checked.

Q. He testified it was not on the list? A. I don't know how he would know whether his name was on the list or not; he wouldn't have access to the records.

Q. Of course, we all have access, because we have Xeroxed them, haven't we.

Judge Godbold: Let's don't pursue that.

[130] Q. Then you went to West Greene; is that correct? A. I went to West Greene.

Q. And in West Greene, you spoke to one person, Mr. William Montgomery, who is white; is that right? A. I have spoken to several people at West Greene from time to time; who I spoke to at that particular time, I do not remember. But I have talked with several, Mr. Williams is one.

Q. Now, when you testified in November, you said about Mr. Williams, that is all you spoke to out there, that is right, and your answer is yes? A. I presumed you referred to the last trip I had made to West Greene. If not, then certainly that is in error; I presumed you meant the August trip.

Q. You mean in the month of August or for the year? A. For the compiling of the August jury.

Q. All right.

There is no question about it? A. That is what I said,

Mary C. Yarborough—for Plaintiffs—Direct

I have spoken to other people there, but not at that particular time, if that is what I said.

Q. Do you know Mr. John Rice? A. No, sir, I don't.

【131】 Mr. Jelinek: Mr. Rice, would you stand up, please?

Q. Do you know this gentleman? A. Yes; I do. I didn't know his name.

Q. In fact, do you know that he lives in West Greene, do you know that? A. I believe so.

Q. Now, do you know—let's assume that he went to the eleventh grade, and that he has had no criminal convictions, and he can read and write. Do you think he is somebody that should have been considered for the jury?

A. Ministers are never put in the Jury Box; the Commission has never put them in, black or white.

Q. Is that the law, or is that the policy? Isn't that a decision you have made by yourself with no foundation of law whatsoever?

Mr. Boggs: We object to that question.

A. It is not a decision I made.

Judge Godbold: It is overruled.

Q. Would you answer that question? A. I don't know why they don't put ministers in 【132】 the box, but they have never been put in in the twelve years I have been in office.

Mr. Jelinek: Will counsel concede there is no law prohibiting ministers—

Mary C. Yarborough—for Plaintiffs—Direct

Mr. Boggs: I—

Judge Godbold: Mr. Jelinek, the court rules on the law. You don't have to get a stipulation from counsel on the law.

You can help us find it sometimes, but you can't create it by stipulation.

Q. After that, you did go to Mount Hebron, did you not?

A. Yes.

Q. Your testimony was you spoke to two people, both white, Jimmie Campbell and Tom Pointer? A. Yes.

Q. Of these people, did you speak to any Negroes there?

A. No, sir; I didn't.

Q. Do you know any Negroes there? A. No, sir; I don't believe so.

Q. Neither school teacher nor minister, or anybody? A. Not that I know of.

【133】 Q. Did you attempt to find any Negroes to talk to? A. No, I didn't.

Q. You went to Pleasant Ridge, and you spoke to Mr. Owen and Mr. Steele and they are both white; is that right? A. That's right.

Q. Did you speak to any Negroes there? A. No, I didn't.

Q. Do you know any Negroes there? A. No; I don't.

Q. You went to Mantua, and you spoke to a Martin Woodson who is a Negro teacher, and a Mr. Eatman who is a white storekeeper? A. If I told you these are people I saw at that time, I am sure that is right.

Q. I am sure, too.

And you did not speak to any other members of the Community? A. No.

Judge Godbold: Is all of this in the deposition? Are we just stating something already in evidence?

Mary C. Yarborough—for Plaintiffs—Direct

Mr. Jelinek: Yes, it is all in the deposition.

[134] Judge Godbold: What is the purpose of going over it again with Mrs. Yarborough, because the court will have to read all of these depositions before we rule on the matter.

Mr. Jelinek: I am trying to high light some of it. I have only three more names if the court will bear with me.

Judge Godbold: All right.

Q. Now, in Union you spoke to three white people, Mr. Chambers, Mr. Pierce and Mr. Friday? A. Yes.

Q. And they are all white? A. Yes, sir.

Q. Do you know any Negroes in Union? A. Not that I know of.

Q. Is the same true about Knoxville? A. I don't know many of the Negroes out in the County.

Q. Pardon me? A. I don't know many of the Negroes out in the County.

Q. Would it be a fair statement you know hardly any?

[135] A. That is what I have been trying to say to you.

Q. You virtually know none in the County? A. Very few.

Q. And the same is true in Springfield.

Now, for the entire county then, is it true that for the entire county—do you know how large Greene County is, by any chance? A. No, sir, I don't.

Q. For the entire County, you spoke to only twenty-one persons, and only seven of them were Negroes, one-third? A. That could well be, but the beats are small and those people know the people in those communities.

Q. Now, teachers, you have teachers on the jury roll; is that right? A. Yes.

Mary C. Yarborough—for Plaintiffs—Direct

Q. Now, teachers are exempt, if they choose to be, isn't that right? A. My understanding is that if it is a time when school is actually in session, they may be exempt, but they do not have to claim exemption.

Q. You are permitted to put teachers on your jury rolls and have, haven't you? [136] A. The jury commission puts the names on the jury roll.

Q. Let's say you are permitted to offer as eligible names the names of teachers. This would not be a violation of your duties to offer names of teachers? A. It is not a violation of my duties to offer the names of anybody that I know of.

Q. Now, do you know of any—well, I withdraw it.

Is it a fair statement that on the exemption—there are exemptions in the law of those who are not to be on the jury; is that right? A. I believe so.

Q. And is it true, is it a fair statement, you looked over this list at the time of the deposition? A. I believe so. I believe you read it and we took it into the deposition.

Q. Will you agree that of the group that we covered, the majority of the Negroes were teachers? A. No; I would not say the majority of the Negroes are teachers on the roll.

Q. There are certain groups exempt from serving. Of that group that are exempt, the only exemption that covers Negro jobs are those who are teachers? [137] A. I don't know.

Q. Well, this was your statement at the time of the deposition? A. If that is what I said at the time of the deposition, all right.

Q. Now, let's go into the list.

You get a list such as from Professor Young at Boligee; is that right? Professor gave you names? Assume hypo-

Mary C. Yarborough—for Plaintiffs—Direct

thetically you get a list of names from Professor Young? A. All right. Let's assume I did.

Q. When you get these names, do you check his judgment? Do you investigate to see if this person is reputed to be of high moral character? A. No; I leave that up to the Jury Commission.

Q. Is it not true that the Jury Commission, as you testified, that the Commission also relies on Professor Young's judgment? A. I am sure they do. He is a wise man.

Q. Highly respected? Do you consider other than the Negroes who have been convicted of crimes, do you consider the reputation of Negroes in the community in Greene County? [138] A. Some of them, and some of them I don't. Actually, the reputation that I know mainly is the ones who have been in trouble.

Q. You know the bad reputations? A. I know the bad reputations.

Q. Of those who have actually been convicted? The statute asks you to choose or select those reputed to be of high moral character. You actually don't know the reputation of most Negroes in Greene County, do you? A. No, sir.

Q. When Professor Young or anyone hypothetically submits you a list, other than convictions, you take his word for it, that they are of high moral character; is that correct? A. I give the list to the jury commission and they decide.

Q. In fact, they take his word for it, don't they? A. I don't know, Mr. Jelinek.

Q. Eventually you sit a full day when the jury commission sits? A. Yes.

Q. And this is the day you accept payment for; is [139] that correct? A. I am not paid.

Mary C. Yarborough—for Plaintiffs—Direct

Q. You are not paid for that day? A. No; I am not paid.

Q. Now, on that day, is it correct that it was on August 16, 1966? A. Yes.

Q. On that day, you worked a full day; is that right, 8 to 6? A. I don't know whether we finished in one day or whether it took two.

Q. Now, the purpose of sitting is to prepare the jury roll; is that right? A. That's right.

Q. And the jury box? A. Yes, sir.

Q. Now, the jury roll is taken from all the eligible people who are eligible, males? A. It is both.

Q. But there weren't females at the time of Mr. Boku-lich? A. No.

Q. Now, you used a last year's jury roll, isn't [140] that right, isn't that your starting point? A. That is your starting point.

Q. And you go through all of these other lists you talk about, the voter registration list, the tax assessor's list, you did not do this year, and the telephone book, and then you also make your jury card, you prepare your jury card for the jury box? A. Yes.

Q. Am I correct when you sat in August, you made the card for the jury box up in exactly the same names as in the jury roll? A. Yes.

Q. Am I correct on August 16th, the jury roll was exactly the same as the cards in the jury box? A. If nobody had pulled any cards before this for a venire, it would have been the same.

Q. The venire isn't chosen then, isn't it chosen some weeks later? A. Yes.

Q. You would have the whole box full? A. You would

Mary C. Yarborough—for Plaintiffs—Direct

have the whole box full, and his card would correspond to the jury roll.

Q. All right.

【141】 And this is some little card that you put in the box, maybe one-third of this size? A. It is about that size, I think, close to it. It has room for name, occupation, and address and business address.

Q But, at any rate, you draw these cards.

Now, on that day you were assisted by three members of the Jury Commission; is that correct? A. I assisted three members of the Jury Commission.

Q. All three members who helped you compile your list, one of them was Mr. Morrow, is that right? A. That's right.

Q. Now, the purpose of the meeting, as you understand it, is to sift through all the suggestions, all the names you compiled, and choose some new people for the new jury roll? A. Yes.

Q. And of the people working that day, one was Mr. Morrow; is that right? A. I presume he was, and you, I believe, have a copy of that.

Q. Is it not true, Mr. Morrow had been seriously ill for many, many months prior to the date of the Jury 【142】 Commission Meeting? A. I don't know how long he had been ill, but he had been ill.

Q. And, in fact, he has been so ill he has been forced to resign since then; is that correct? A. Yes, sir.

Q. Is it a fair statement he was in no condition to be running around the County looking for Negro names during his illness? A. Yes; I think that would be fair to assume.

Q. Then you had Mr. Durette.

Mary C. Yarborough—for Plaintiffs—Direct

Mr. Durette had just come on the jury commission; is that right? A. That's right.

Q. And he had absolutely no names to offer; is that correct? A. I wouldn't say that. Mr. Durette took a vacant place, and Mr. Durette has worked in the Merchants and Farmers Bank for years and knew people, and knows people from one end of the County to the other, so I would say Mr. Durette was in pretty good position to judge both black and whites.

Q. Let's assume hypothetically Mr. Durette testified [143] he did not take a single name; would that refresh your recollection, that he did not add one single name in that jury setting? A. If he told you he did not, I don't guess he did but I think what he meant—well, I don't know, probably that is right. If Mr. Durette tells you that, I am sure that is correct.

Q. Let me read you this one sentence; "But you had nothing to add, because you had just been appointed"; is that correct?"

"That is correct."

A. That is Mr. Durette's testimony? A. That's right.

So, two of the commissioners were of little help, and we come to the third commissioner, Mr. Gray; is that right?

A. Right.

Q. Is Mr. Gray here, by the way? A. Yes; he is.

Q. We will have a chance to discuss this with him.

Now, you don't recall how many names you yourself offered, in your total of eleven precincts, you have no notes or recollection how many names you [144] offered? A. I have no idea. The only reason I had those letters is because everytime we had been to Federal Court, they wanted to know what Negroes did you contact. Those were letters from Negroes, and that is why they were kept.

Mary C. Yarborough—for Plaintiffs—Direct

Q. And your own lists were not kept? A. No.

Q. Assuming hypothetically that of the 37 new names added, only five of them did not come off of these lists, the ones you and the other three commissioners would have added would have been five; is that right? A. I didn't add any of the names.

Q. You did not offer any names? A. I offered names, but you keep saying I added.

Q. That is true? A. I simply typed the cards the members of the Commission asked me to type.

Q. Did Mr. Durette assist you in that? A. Yes. He went over the list that we had prepared just like the rest of them did.

Q. How much time went into the clerical aspect of your work that day? [145] A. All day, and possibly, I don't remember whether we met one day or two; sometimes we have been able to get through by working overtime, and other times we have had to come back the next day and finish it.

Q. Were there any discussions about some Negroes whose reputation was not sufficiently high to be on the jury? A. I don't remember.

Q. Do you remember any discussion about whether any Negro was eligible, besides convictions now, did you discuss the reputation of Negroes as far as you recall? A. I don't recall.

Q. Is that the day you used the poll list or the registration list? A. I beg your pardon.

Q. Did you use the—did you use that list that day? A. We always used—

Q. That day you went through the registration list? A. Yes.

Q. And the registration list is under 2,000 names? [146]

Mary C. Yarborough—for Plaintiffs—Direct

A. I don't know how many names are on that list.

Q. If I asked you to assume hypothetically there were some little under 2,000 Negro names on the registration list submitted by the Federal Registrars, did you go through all 2,000 names that day? A. We went through all the names on the voting list. We have done it court after court after court.

Q. Of the 2,000 names on the Registration list, you chose all of those whom you felt had no convictions? A. They chose.

Q. Had no convictions, and were reputed to be of high moral character; is that right? A. I presume they did.

Q. And of that 2,000 names, they found 37 new people; is that right? A. I don't know.

Judge Godbold: You are assuming that 37 throughout. From all that your evidence shows, it may have been 200 people who died, moved away, and left the County.

Mr. Jelinek: We have checked specifically, and this will show that of the 47 Negroes, I think perhaps [147] 46 or 45 remaining, of the other 37 were added. It is in the evidence before the Court; it is already there that there were 47 Negroes in 1965, and perhaps two died or moved away, leaving 45, and another 37 were added.

Judge Godbold: You don't have any information on who moved away and dropped out?

Mr. Jelinek: Maybe two, but there will be 45 or 47 remaining.

Judge Godbold: All right.

Q. Is it correct that the Jury Roll is done by numbers, jury number 46 and 47? A. Yes, sir.

Mary C. Yarborough—for Plaintiffs—Direct

Q. That refers to a year? A. I presume it does.

Q. 47 would be, say, 1966; is that right? A. I don't know.

Judge Godbold: Are you almost finished with this witness?

Q. Now, you take the jury roll from, let's say, '65, and you rewrite the names that go on to '66 under the initial; is that right? A. Well, people die, people, as his Honor said, [148] move away. People get to be over 65, and when that happens, if anybody knows it, their names are taken out of the box. I mean, if it comes up in court you are over 65 and you don't want to serve, we write it on the card, and that name is taken out of the box at the time.

Q. If you are carrying over a name from '65 to '66, you write it again? A. Yes, sir.

Q. All you have to do is look from '66 to '65 to see if any person is carried for another year? A. Yes, sir; I don't fool with the jury roll; I type the cards.

Q. This will be borne out by looking at the jury rolls; is that right? A. I think so.

Mr. Jelinek: Your Honor, I think I will have some more time with a witness, if your Honor is thinking of a recess.

Judge Godbold: No, sir, I was thinking mostly of getting through today.

We will take a ten minute recess.

(Mid-afternoon recess.)

[149] MARY C. YARBROUGH, thereupon resumed the witness stand, and testified further as follows:

*Mary C. Yarbrough—for Plaintiffs—Direct**Direct Examination by Mr. Jelinek (Continued):*

Q. Mrs. Yarbrough, I show you the jury roll and I refer your attention to William Branch of Forkland; you have number 47, whatever year that would be.

Would you tell me what the occupation for Mr. Branch is listed as? A. I am sorry, I can't see it. Teacher?

Q. Would that be Preacher? A. Maybe it is.

Q. Is Mr. Branch a Minister? A. Maybe he is.

Q. Isn't he, in fact, on the Jury Roll? A. I didn't remember it, but evidently he was.

Q. Do you know Mr. Norwood? A. Sherman Norwood, I am familiar with his name.

Q. Is he a Preacher? A. Not that I know of.

Q. Now, I ask you hypothetically to assume that on the jury venire for 1966, Mr. Bokulich's venire, [150] that of the 65 names on the list, 43 had been on previous juries within the last six years? A. I think that would be quite possible, because until this last jury roll was composed when women were added, there were only 300 something names in the jury box, and when you draw for two courts a year, both Grand Jury and Criminal Court, you have practically exhausted your source, so people's names are quite apt to show up more than once.

Q. In other words, if you had—you had 471 names to choose from in 1966; is that right? A. I can't see it, but if you say that is it, all right.

Q. And on the '65, assume hypothetically that sixteen of the '65 had been on three times in the last six years, would that seem reasonable, too? A. Yes, it would.

Q. And if eleven had been on eleven times in the last six years, does that seem reasonable? A. Yes, it would.

Q. Now, I asked you to produce the jury venire list.

Now, you have the original of the venire list? [151] A. In my office.

Mary C. Yarborough—for Plaintiffs—Direct

Q. Not here? A. No.

Q. You didn't honor the subpoena? A. Those venires are not records of the Jury Commission, Mr. Jelinek. They are the court records.

Q. And once again— A. And I was not subpoenaed as Circuit Clerk.

Q. Now, at the time that I was in your office taking your deposition as Clerk of the Jury Commission, you mentioned to me that all the records of the venire were missing from '61 and '62. Are they still missing? A. I do not know.

Q. And you mentioned that the Spring, 1963, list was missing; is that still missing? A. It could be.

Q. And the Fall, '63 long list was missing; is that still missing? A. I don't know.

Q. And the Fall, '65 long list is missing; is that still missing? A. I don't believe so.

[152] Q. You think that has turned up since then? A. And I think most of the others have, too.

Q. So you have got your jury roll and you have got your cards and your jury box which is identical in this point in August, 1966? A. Right.

Q. Someone is going to have to pick out these names to make out the venire list? A. That's right.

Q. Who picks the names? A. The Judge.

Q. Before he picks them, are they shuffled? A. Yes.

Q. Like a deck of cards? A. No, not like a deck of cards.

Q. But in some random way? A. They are stirred in the box, mixed up.

Q. In the way that is certainly fair, no one knows where any name is? A. No one knows.

Q. And then they are picked by Judge Hildreth? Is that right? A. They are drawn by Judge Hildreth.

Mary C. Yarborough—for Plaintiffs—Direct

[153] Q. Your testimony is that they were drawn in your office; is that correct? A. That is correct.

Q. And with you alone, and with Judge Hildreth? A. No.

Q. Who else is present? A. The Sheriff.

Q. Anybody else? A. Sometimes Mr. Banks has been present.

Q. What about in 1966? A. I couldn't tell you, Mr. Jelinek, but I am quite sure Judge Hildreth and the Sheriff and I were there.

Q. Are you aware that Section 30 of the Alabama law requires that they be picked in open court? A. No, I wasn't.

Judge Godbold: You don't have to ask her about the law, and the court will point out to you that there is an Alabama Supreme Court decision stating that the Clerk's office is open court; you don't have to argue with the witness.

Q. Was anybody invited to attend? A. No.

[154] Q. Was any member of the public there? A. No.

Q. Were you told when it was to be drawn? A. I usually don't know until Judge Hildreth tells me and we call the Sheriff.

Q. Since this case began, you had a special term? A. Since what case began?

Q. Since September, 1966, since the papers were filed and this case began, and I took your deposition, have you had a special term to add new names on to the jury roll? A. To add women to the jury box when that law went into effect.

Q. Did you add just women? A. No, both names while we were at it, were added.

Mary C. Yarborough—for Plaintiffs—Cross

Q. Do you know how many male names you added? A. No, sir; I don't have any idea.

Q. Do you know how many total names you added? A. No, sir, I don't.

Q. Do you know how many Negro names you added? A. No, sir, I don't.

Mr. Jelinek: I have no further questions.

[155] *Cross Examination by Mr. Boggs:*

Q. Mrs. Yarbrough, you were asked about covering the area in Clinton.

How large an area is that? A. Quite small. There is one little store with a Post Office in it.

Q. Not many people live there either? A. No.

Q. They questioned you about Mr. Barton. You say you questioned Mr. Barton. About when did you visit the various precincts that you asked him about the people and in the Forkland area, and is Forkland a large area? A. No; it is quite small.

Q. Has Mr. Barton always lived there? A. As far as I know.

Q. Does he operate a store there? A. Yes, sir.

Q. Is he a former member of the Jury Commission? A. He is.

Q. Is he familiar with everyone in Forkland? A. I would think so.

Q. You have heard him state so? **[156]** A. Yes.

Q. You have gotten information from him for that source in Forkland? A. To give to the Jury Commission, yes, sir.

Q. Mrs. Yarbrough, in preparing the last Jury list, when was that done? A. This last list?

Mary C. Yarborough—for Plaintiffs—Cross

Q. Yes. A. That was in January.

Q. In preparing that list, did you consult various people in various parts of the County? A. I did.

Q. Does this list—was it prepared by you or by someone under your direction? A. This list was prepared by Mrs. Merchant in my office.

Judge Godbold: What list is this; is this in evidence, or identified?

Mr. Jelinek: I am going to have it identified.

Judge Godbold: Have it marked for identification and let Mr. Jelinek see it and ask her about it.

(Defendant's Exhibit 1 identified.)

【157】 Mr. Jelinek: These events took place after the dates and allegations referred to in the complaint.

Judge Godbold: We understand.

Q. This was prepared under your direction in your office, was it? A. Well, not actually even under my direction. Mrs. Merchant thought it would be needed, and she prepared that.

Q. Do you know it is true and correct? A. She gave it to me and it is correct.

Q. You have checked it yourself? A. I have checked it, and these are all people I have seen in regard to filling the Jury Box.

Q. Are those people that you consulted in the preparation of the last jury box? A. That is right.

Q. How many names does this list contain? A. 35.

Q. Greene County is a county of about what population? A. About 14,000 people, I guess.

Q. Will you put a "C" by everyone that is a Negro on there that you consulted?

Mary C. Farborough—for Plaintiffs—Cross

Mr. Jelinek: Why don't you put an "N" for Negro?

[158] Judge Godbold: What is the number of this Exhibit?

Mr. Boggs: Defendant's Exhibit 1.

Judge Godbold: Still for identification?

Mr. Boggs: Yes.

A. This one was not consulted; this name should come off; we saw a letter from him.

Q. Did you get a letter from him? A. Yes .

Q. That was consultation then?

Judge Godbold: Are you talking off the record, or what?

A. I told him a name that should not have been on here that Mrs. Merchant had found a letter from.

Judge Godbold: Mr. Boggs, I think you will have to proceed in a little more orderly way. This is marked for identification, and I doubt if it can be offered—authenticated at this stage, without oral testimony.

Mr. Boggs: The question I wanted to ask, Judge, if she knew of her own knowledge that these people were consulted by her, and how many were Negroes, and how many were white. I am letting her **[159]** identify and bring out and mark on here with an "N" the ones that were Negro.

Judge Godbold: I understand, but I understand she is taking some names off which I don't think is admissible.

Q. Number 16, is that name obliterated by you? A. It was.

Mary C. Yarborough—for Plaintiffs—Cross

Q. What was the reason it was obliterated? A. Mrs. Merchant typed this list from letters in my office; the letter from R. I. Beasley, was prior to making up of this jury list. It was one that went back maybe to a year ago, maybe the August one, I don't know, but these other people, I did contact all of them with the exception of Johnny Goodson, and that list was given to me by somebody else, I think maybe Mr. Morrow.

Q. Of the ones that you contacted there of those thirty-four remaining, how many are Negroes and how many are white? A. Nineteen are Negroes, and you subtract. When they take my adding machine away from me, I am lost.

Judge Grooms: Fifteen.

A. Thank you, sir.

[160] Q. How many are Negroes and how many are white you consulted in preparing the last jury roll? A. I consulted 34 people.

Q. How many were Negroes and how many were white? A. Nineteen were Negro and fifteen were white.

Q. Nineteen were Negro that you consulted in making up your current jury roll? A. That's right.

Q. How many names are on the present jury roll, if you know? A. There are eleven hundred names—1198 on the jury roll presently.

Q. And of those, did you, with the assistance of the jury commission, go over and identify the ones that you knew to be Negro? A. Now, Mr. Durette went through that and marked the ones that we knew were Negroes, but there were a number of people we did not know whether they were Negroes or whether they were white, so we marked only the ones we were sure of.

Mary C. Yarborough—for Plaintiffs—Cross

Q. How many of that 1198 did you and Mr. Durrett identify positively as Negroes? A. 390.

[161] Q. There could have been a number of others that were Negroes you didn't know? A. Yes.

Judge Grooms: This is the present jury roll?

A. Yes.

Judge Grooms: 1198 and 390?

A. Yes.

Mr. Jelinek: Is that the list? I haven't seen it.

Judge Godbold: Yes.

Mr. Jelinek: Where is the rest of the figures?

Mr. Boggs: I just asked her; I didn't introduce anything.

Q. Did you observe the Grand Jury that Bokulich—that the Federal Court enjoined from operating in Marengo County; did you observe that Grand Jury that was enjoined? A. In Greene County?

Q. The one that the Federal Court enjoined us from operating? A. There were eighteen people on the Grand Jury, and eight of them were Negroes.

[162] Q. How many does it take to make an indictment, twelve, does it not?

Judge Godbold: The court is familiar with the law.

Neither side has to prove the law by the witness.

Q. I will ask you if you don't know of a number of white people who live in Greene County who have not been put on the Jury Roll? A. That's right.

Q. Is that correct? A. That's right.

Mary C. Yarborough—for Plaintiffs—Cross

Q. I believe you stated in making up the list you submitted to the Jury Commission, you visited every precinct in the County? A. I did.

Q. Aside from the letters Mr. Jelinek had copies of, have you copies of other letters you received? Letters that you received from people in consultation there? A. Yes.

Q. Would you get them, please?

Mr. Jelinek: Was this before or after August,

[163] 1966?

A. This was for the last compiling of the jury roll.

Mr. Jelinek: After August, 1966?

A. Yes.

Q. Have you those letters? A. They are here, I think.

Q. Would you get them here? A. Most of them weren't letters; most of them are just lists they sent.

Q. What is this right here, please, Mrs. Yarborough? A. Mr. Albert Gray brought these in; they are his figures, a list given him by George Beck and one by Clonie Devill and one of Mrs. Reeves.

Q. Do you know whether they are white or Negroes?

A. Clonie Devill is a Negro and I don't know about George Beck, and Mrs. Reeves is white.

Q. Besides the efforts that you have made, the Jury Commission has made an effort to obtain jurors? A. Yes, sir.

Q. They had people submit lists, and they would consult them, and you were present, you would go over and consult as to whether a person should be added to **[164]** the jury roll or not? A. That's right.

Q. Is there any designation as to race on the cards; or any secret marks, or anything else on the jury rolls that designate race? A. No, sir, not on the jury roll or on the jury card.

Mary C. Yarborough—for Plaintiffs—Cross

Q. Are they selected according to qualifications, regardless of race? A. That is right.

Q. How long have you been clerk of the Jury Commission? A. About twelve or thirteen years.

Q. Did you deal with Negroes there every day in your office, and talk with them every day? A. Yes, sir.

Q. Do you come in contact with them frequently in your work, and see them? A. That's right.

Q. Have you made a compilation or check as to the crimes, disqualifying crimes in the Circuit Court of the residents of the County with regard to race? A. Felonies?

【165】Q. Yes. A. Mr. Banks and I went through that just before he went to Army Camp.

Q. What did you find?

Mr. Jelinek: Before we get to that, this is reminiscent of the last time this testimony was given. Are these documents present; are the names here? If they are not, I object to it as a hearsay statement, they are 95% and 96%, when we have no opportunity to contradict it; if they can't produce the list of names as we did to show who are the Negroes and who are not, then we ask that this evidence not be received.

Judge Godbold: I think it is admissible, Mr. Jelinek.

Q. Will you testify to that? A. We did not check misdemeanors; we only checked felonies, and I can't remember the exact figures, but the percentage was 96.99 for felonies committed by Negroes who lived in—I am not talking about ones who came in from the outside, I am talking about residents of Greene County.

Mary C. Farborough—for Plaintiffs—Cross

Q. Now, the Negroes you come in contact with, you say you come in contact with them every day, and you [166] see them in your office every day, and do you know the comparison to the white people, the educational qualifications of the Negro people in Greene County in comparison of white people? A. Of course, they are improving.

Judge Godbold: I didn't understand the answer.

A. They are improving, but most of those Negroes who would be of an age to be in the jury box leave and go to the—go to other places to get jobs, and it leaves you with more of the illiterates, the older ones who—

Mr. Jelinek: Your Honor, once again I object.

Judge Godbold: I think it is pertinent.

Mr. Jelinek: There are no names given; we don't have the opportunity—she doesn't name one person we could deny that has moved, or one person as a felony who we could deny was a Negro. We have no opportunity to refute this.

Judge Godbold: She is testifying as to her knowledge of the conditions in the community, and she is competent.

Judge Grooms: I think she is testifying from records, too.

[167] A. Yes, sir.

Judge Grooms: Do those records indicate whether they are white or Negro?

A. No, sir, but between Mr. Banks and me, you have—we have had these before us and can remember them.

Mary C. Yarborough—for Plaintiffs—Cross

Judge Grooms: This was from actual knowledge?

A. Actual knowledge, yes, sir.

Judge Godbold: I understand.

A. It is not from what somebody dreamed up.

Q. I will ask you whether or not you observed the ones that came in and voted; were not a large number of them over the age of 65? A. Well, I am sure that a large number of them are, Mr. Boggs, but I couldn't testify to how many, or to percentages, because I don't have anything to do with the voting.

Q. But any Negroes you come in contact with, I believe you stated their educational qualifications are low, and a large number of those within the age bracket can't write their names? A. A number of the older ones can't.

Q. Are you familiar with and have you had opportunity to observe the ones that are recipients of welfare and [168] have illegitimate children in the county?

Mr. Jelinek: I object to that; there is no basis for that in the qualification.

Judge Godbold: Objection sustained.

Mr. Boggs: The purpose of that—

Judge Godbold: I am not interested in your argument. Objection is sustained.

Mr. Boggs: I will phrase the question this way. You wouldn't allow me to bring in—

Judge Godbold: Ask any question you want, and we will rule on it.

Q. In your rounds in going to the precincts and checking, and from your observations there in the County, do you know, of your own knowledge, that many of the Ne-

Mary C. Yarborough—for Plaintiffs—Cross

groes live with mothers and don't know who the father is, and have never been married?

Mr. Jelinek: I object to the slander, and it is irrelevant.

Judge Godbold: That is irrelevant, and don't try it again.

Mr. Boggs: Are women on the jury now—

Judge Godbold: Don't try it again.

Mr. Boggs: All right, sir.

[169] Q. On the last—have you observed cases being tried in court in the last number of years, both in the criminal and civil side of the court? A. Yes, sir.

Q. And how often, when there were white litigants, have you ever seen Negroes sitting on the jury? A. They have been on juries for years.

Q. I mean prior to the present time? A. Yes.

Q. Even where there were white litigants actually sitting on the petit jury? A. Yes.

Q. And you have Negroes—and have Negroes been on the Grand Jury from time to time, and you have observed them on it? A. Yes, sir.

Q. I believe you testified when we were enjoined there were eight Negroes on that particular Grand Jury? A. Yes, sir.

Q. You stated it has been the policy not to place Negro preachers or white preachers, ministers of the Gospel generally on the jury roll? A. Yes, sir.

[170] Q. It has been the policy of the Jury Commission for a number of years.

But this William Branch that they spoke to you about, have you ever seen him serve and be present as a juror up in Court, William Branch?

Mary C. Yarborough—for Plaintiffs—Redirect

Mr. Jelinek: I object to that, Your Honor. The criteria—

A. Mr. Boggs, I can't remember.

Judge Godbold: Let him object.

Mr. Jelinek: The question is when the policy precludes, as the testimony was, ministers from being on the jury roll.

Judge Godbold: Overrule the objection.

Q. Have you ever seen William Branch as a juror up there? Have you ever seen him appearing in court as a juror? A. I don't know; I would be afraid to say. I think he has been that, but I am not sure.

Mr. Boggs: That is all.

Mr. Jelinek: Just a minute.

Redirect Examination by Mr. Jelinek:

Q. Mrs. Yarborough, I—about these convictions, did you see a letter that I sent to [171] your attorney asking you to have the names of persons who you believed made up the 96%, did you see that letter?

Mr. Boggs: We object to that. A letter is no way to get information.

Q. Were you aware this information would be presented before this court?

Mr. Boggs: We object. If he wanted information he could take her deposition.

Judge Godbold: Sustain the objection. I have seen

Mary C. Yarborough—for Plaintiffs—Redirect

the letter and it does not require her to produce anything.

Mr. Jelinek: I just asked the question.

Judge Godbold: I understand. The letter has no legal effect to say I expect to prove so and so by you.

Mr. Jelinek: I'm sure the witness, if she was aware of the testimony—that it was going to be used—

Judge Godbold: I have sustained the objection.

Q. Did you testify in 1964, in the Coleman case to the similar extent about convictions? A. I don't remember.

Q. Did you prepare a new list, or did you rely [172] on the list you made up in 1964? A. This wasn't one we relied on in 1964. We made a new one.

Q. Did you do it with Mr. Ralph Banks? A. Yes, sir.

Q. Did you make any notations when you did it? A. No, sir, I didn't.

Q. You didn't make a mark, an underlining or a circle? A. We had sticks until we got them.

Q. Do you know, can you name ten Negroes on that felony list? A. Do I know what?

Q. Could you name ten Negroes on that felony list? I will go a step further.

Could you prepare the list for this court? A. You mean out of my head, 4,000 cases?

Mr. Jelinek: Would your Honor consent to having this list sent to Your Honor on a separate date?

Judge Grooms: Isn't there a list in here of criminal convictions?

Mr. Jelinek: Not by race, Your Honor.

Judge Godbold: There is a list now showing the [173] criminal convictions, but it simply does not designate race; am I correct about that? A. Yes.

Mary C. Yarborough—for Plaintiffs—Redirect

Q. Just want to—

Judge Godbold: All you are asking her to do is go down the list and mark those she thinks are Negro?

Mr. Jelinek: Yes, sir.

Judge Godbold: That is the only thing we can do, because the record isn't designated.

Mr. Banks: I think it would be easier to mark them as whites.

Judge Godbold: Could you do that today?

Mr. Boggs: She testifies she did it along with Mr. Banks.

Judge Godbold: The court will ask Mrs. Yarbrough and Mr. Banks to get together and to do it.

Q. Of this alleged 96%, Mrs. Yarbrough, how many felony convictions were there? A. I don't remember. There were several hundred.

Judge Grooms: The list itself shows the type of conviction?

A. Yes, sir, it would show whether it was Grand Larceny or Petty Larceny or what have you.

【174】 Q. You said there were several hundred, two hundred?

Judge Godbold: The list speaks for itself.

A. If you will give me the list, I will be glad to get with Mr. Banks and mark it for you.

Judge Godbold: There is nothing to go into this on oral testimony at all. It will come from something more than the list and markings will show.

Mary C. Yarborough—for Plaintiffs—Redirect

Q. Do you know how many people were repeaters?

Judge Godbold: The list will show that.

Q. Do you know how many were non-residents? A. I did not count non-residents; that is what I wanted to say, either black or white.

Q. You will indicate that on your list also? A. All right.

Q. Now, as to the education, you say that whites in Greene County are more highly educated than Negroes?

A. As a whole.

Q. Now, do you have—how highly educated do you have to be to be on a jury? A. I don't have a thing to do with how much education they have to have to be on a jury.

Q. I have asked you as a clerk of the Commission how much education you have to have to be on a jury? [175]

A. I have never asked anybody.

Q. Isn't it the fact that you have merely to be literate, to read?

Mr. Hall: We object; the Code speaks for itself.

Judge Godbold: The objection is sustained.

Q. Is it not true that even if you are illiterate and own property, you can be on a jury?

Mr. Hall: We object, same grounds.

The Court: These are all matters of law and we will read the Code sections.

Q. You mentioned Forkland is a small place; is that right? A. Yes.

Q. You meant the City of Forkland or town of Forkland? A. Yes.

Mary C. Yarborough—for Plaintiffs—Redirect

Q. In fact, the Forkland precinct is this whole area, isn't it? A. I don't know, I have never seen it marked off that way.

Q. Let me show you the registration list? A. I know Forkland has grown to where it is divided into two beats now.

[176] Q. Now, I show you from the Greene County Democrat, the official list of qualified electors, and if I show you seven hundred names from Forkland, would that be some indication it is not a tiny town of residential and registered voters; would you change your testimony of it being a small town, if I show you a list of 700 names? A. It is a small town in a relatively small area that they have.

Q. If I showed you that Boligee had 300 registered names, would you still maintain Boligee— A. That is Clinton.

Judge Godbold: Mr. Jelinek, is this purely a waste of time? We want to give you full leeway, but this is of no probative value to this court.

Mr. Jelinek: Let me ask one more question, and I will drop the whole issue.

Q. When you answered the questions about Boligee and Clinton and Forkland being small, you were referring to the town and not the Beat? A. That is correct.

Q. The Beats are substantially larger? A. The Beat would be larger in every instance.

[177] Q. Forkland, the Beat is not small? A. Evidently it is not small.

Q. And Boligee is not small, the Beat? A. No, Boligee is not small.

Albert Gray—for Plaintiffs—Direct

Mr. Jelinek: No further questions.

Judge Godbold: All right, Mrs. Yarbrough, step down.

You and Mr. Banks can confer about the list and mark whichever is convenient, white or Negroes.

Mr. Jelinek: Mr. Albert Gray.

ALBERT GRAY, being first duly sworn, testified as follows:

Direct Examination by Mr. Jelinek:

Q. Mr. Gray, you are a member of the Jury Commission?

A. Yes.

Q. And you are appointed by the Governor; is that correct? A. Governor Wallace? Yes, sir.

Q. The ex-Governor, of course? A. Yes.

Q. Now, is your job—your job is to choose those [178] eligible to sit on the juries, jury roll of Greene County; is that right? A. It is our job to try to find out who is eligible, to the best of our ability, which requires a lot of time.

Q. Now, do you have a lot of time to put into this work?

A. No, sir; I don't.

Q. In fact, you have another job; isn't that right? A. Well, about fourteen hours a day.

Q. What do you do these fourteen hours a day, Mr. Gray, what is your occupation? A. Well, I feed the dogs and then I put the hands to work either plowing cotton or planting soybeans.

Judge Godbold: I take it you are a farmer; is that a fair statement?

A. Yes, sir.

Albert Gray—for Plaintiffs—Direct

Judge Godbold: Let's go on from there.

Q. In the hours after your fourteen hour day, is this the time you attempt to find Negroes and whites? A. Not necessarily so.

Q. You don't put in full time getting these names? A. No, sir.

【179】 Q. Now, have you ever asked for pay for the days you worked for the Jury Commission, getting Negro names? A. Well, yes.

Q. Have you ever received a voucher? A. I have.

Q. Now, have you gone into the counties, into the precincts to obtain— A. Mr. Fulton Durette and I made a complete survey of the county prior to 1966. We consulted with both colored and whites.

Q. This is Mr. Melvin Durette? A. No, Mr. Fulton Durette.

Q. He wasn't on the jury commission? A. Not now, he was at that time.

Q. I am talking about in 1966? A. I didn't know you specified 1966.

Q. Yes.

I know his father was on the commission, but I am referring now to just the efforts you made to obtain names for the jury roll in Greene County for the meeting to be held August 16, 1966, just that year, the efforts you made to obtain names?

【180】 Are you well acquainted with the Negro community? A. Fairly well, nothing extra.

Q. Do you socialize with Negroes? A. No.

I have a good many Negroes I consider my friends, but I don't socialize with them in the least.

Albert Gray—for Plaintiffs—Direct

Q. I don't know if I understand you right. If you said, "Nigger", you should refer to Negroes in this court? A. You heard what I said.

Judge Godbold: Mr. Jelinek, the court will admonish the witnesses.

Mr. Jelinek: Will the court instruct this witness—

Judge Godbold: I didn't understand which you said, but if that is what you said, the objection is well taken.

A. I apologize.

Q. Do you attend church with Negroes? A. No.

Q. Do you attend churches, fraternal organization meetings, and functions with Negroes? A. No, I don't.

[181] Q. Are you well acquainted with Negroes in the various precincts? A. A good many.

Q. Now, let's look at Forkland.

Now, did you go to Forkland? A. I have been into Forkland, yes, sir.

Q. Did you attempt to get Negro names of jurors in Forkland? A. Yes.

Q. Who did you speak to to get the names? A. Well, I asked Bob Beck for one, and William Branch for another.

Q. And these are two Negroes? A. Yes.

I don't remember all of them.

Q. Did you speak to any Negro churchmen? A. I would consider I did, yes, sir.

Q. What? A. Yes, I would say so.

Q. Who would you call a Negro churchman? A. Bob Beck.

Q. What about Negro schoolteachers? A. Yes; I have consulted with Negro school teachers, **[182]** too.

Albert Gray—for Plaintiffs—Direct

Mr. Jelinek: Your Honor, may I request the same admonition.

Judge Godbold: I think you are being hypertechnical.

The phrase "nigger" has not been the phrase heard by us.

Mr. Jelinek: That is what I heard again.

Judge Godbold: I think you are being hyper-technical.

Q. In Eutaw, you spoke to Howard Brown; is that correct? A. I guess I did, if it says so.

Q. Was it your testimony you did not speak to anybody else but Howard Brown? A. That is correct if that is what it says.

Q. That is the same Negro Deputy Sheriff? A. That is correct.

Q. Is it correct in Springville you don't remember speaking to any Negroes? A. That is correct.

Q. And these are the four precincts you provided names for? [183] A. That I sort of worked around.

Q. Am I also correct you could not find any list that you submitted to the jury commission? A. I couldn't find them when they wouldn't submit them to me.

Q. Pardon? A. They were not submitted; there was no way for me to find them; I asked for them, and that is all I could do; if they don't send them, I can't submit them.

Q. Did you make a list yourself of eligible Negroes? A. We go by the poll list, the telephone directory and other lists that the clerk might have. It is a pretty thorough list, I would say.

Q. Do you know the reputation of Negroes in the rural areas? A. Well, I guess I would be a fair judge in certain instances, some, I wouldn't.

Albert Gray—for Plaintiffs—Direct

Q. Would you know the reputation of 200 Negroes in Boligee? A. I doubt it.

Q. More like ten or fifteen would be more like it, would you say? [184] A. I may know that many actually, but you can find out. You just have to ask and inquire.

Q. Did you inquire and find out? A. Lots of them, yes.

Q. Now, for instance, in Boligee, you spoke to two or three people, and you said you did not remember their names; is that correct? A. Yes, sir.

Q. And you didn't speak to any Negro churchmen, did you? A. I don't know whether they were churchmen or not.

Q. You have no recollection? A. No; I don't remember.

Q. Now, after you get names—you got some names from lists; is that correct? A. That's right.

Q. Do you check the reputation of the people? A. Yes, sir; as well as we can.

Q. How do you check the reputation? A. Well, we have to check this by going to people that we feel like they have been dealing with, either in the community or else merchants or something to that [185] effect, that might know something; we don't necessarily find out everything about all of them; there are a lot of them we can't find out one way or another.

Q. If you don't know, you can't evaluate; isn't that right? A. Yes.

Q. And, in fact, assuming that you had 82 Negroes out of over 2,000 Negroes over 21, there were certainly lots of reputations you weren't aware of? A. Could be.

Q. Am I correct, the lists that were submitted to you personally were not certainly more than twenty or thirty names? A. I didn't understand.

Q. People submitted a list to you and they would not bear more than twenty or thirty names? A. It was a few.

Albert Gray—for Plaintiffs—Cross

Q. Less than ten, maybe? A. I don't remember the number.

Q. It was certainly a few out of the 2,000? A. Yes.

Q. And you relied on these lists and the four or five people you spoke to in the precincts; is that [186] right? A. Not altogether; that is part of it. We have officials around in town you can confer with to find out certain things.

Q. You did not mention any of these names when I took your deposition in November.

Are these names you have remembered since then, these officials you spoke to? A. I don't recall you asking me that question; you asked me what people submitted lists, I recall that, but I don't recall you asking the other question; you might have, but I don't remember.

Q. If I show you I asked you who you spoke to and you named two or three people, would you like to read this? A. No; I don't care to read it.

Q. Assuming in this deposition it states you spoke to—it states who did you speak to, just two or three, just this one and this one, and that would be all? A. We will let it go at that.

Q. That would be some seven or eight? A. Whatever you say it says.

[187] Mr. Jelinek: No further questions.

Cross Examination by Mr. Boggs:

Q. Did you make any distinction between Negroes and whites in the selection of persons for jury service? A. No.

Q. Do you go strictly according to their qualifications? A. Yes.

Q. Do you make diligent inquiry and consult with other jury commission members and people in the county gen-

Albert Gray—for Plaintiffs—Redirect—Recross

erally in order to ascertain and put them on the jury roll, everybody that is Negro and white that is qualified? A. Yes, sir; we do that to the best of our ability.

Q. Without regard to race? A. Race has nothing to do with it.

Mr. Boggs: That is all.

Redirect Examination by Mr. Jelinek:

Q. Just one more thing; you testified that the Negroes, I think you said the coloreds are the best qualified to determine who [188] should be on the jury; is that right? A. I don't know whether I said that or not. Did I?

Q. Would you like for me to show you that? A. If it is there, o.k. I don't remember.

Q. "If you are going to find any information about the situation, you have got to go to the coloreds to find out who is qualified. They are better qualified to say who is a good outstanding citizen and better qualified to go on the jury?" A. I would say that is right.

Q. I think you testified you spoke to about three or four Negroes? A. Yes, sir, but we covered the whole county prior to that time.

Q. You mean the year before, maybe? A. Yes, the year before.

Q. When you had 47 Negroes on the jury roll? A. I don't know how many.

Mr. Jelinek: No further questions.

Recross Examination by Mr. Boggs:

Q. Negroes are best to know what Negroes should go on the jury? [189] A. That is what my opinion is, yes, sir.

Fred Wallace—for Plaintiffs—Direct

Mr. Boggs: That is all.

(Witness excused.)

Mr. Jelinek: Fred Wallace.

FRED WALLACE, being duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jelinek:

Q. Mr. Wallace, will you tell us who you are employed by? A. I am employed as a staff attorney with the NAACP Legal Defense and Educational Fund, Inc.

Q. Are you working on a particular case involving Greene County? A. Yes, I am.

Q. As part of that case, have you been working with the Registration Records of that County? A. Yes; I have.

Q. Would you tell the court, in your own words, how you have compiled, what information and what the total figures are of Negro registration figures in Greene County?

[190] Judge Godbold: First Mr. Wallace should testify to his compiling procedure.

Q. Would you tell us how you compiled the figures?

Judge Grooms: This was in the Gilmore case?

Mr. Jelinek: Yes, sir.

A. I am attorney for the Plaintiff in Gilmore v. Greene County and pursuant to an inspection order granted by his Honor, Judge Grooms, in this case in about, I believe the date was September 12th, or certainly in that week of September 12th, 1966, I, along with three other persons from

Fred Wallace—for Plaintiffs—Direct

Greene County, went to Judge Herndon's office and there inspected certain steel filing cabinets wherein are kept records divided by Beat and Box and alphabetically within the Beat and Box, all the voters in Greene County.

That bunch of boxes took us several weeks, during which time we copied onto small three by five cards the name, beat designation, address, date of registration of each voter in the County. The cards were not designated by race as required, so, accordingly, after we checked, we still had the job of finding out who were Negro and who were white. That job is not yet completed.

[191] We went from there to the applications for registration which are forms in bound volumes in the possession of the Judge of Probate, Mr. Herndon, they were in his possession at that time, they were Board of Registrars' books, but they are kept in his office. Also, we went through those designating as many Negroes as we could, and whites.

Now, the books that were in that office that were given to us, after some difficulty, were complete, were fairly complete up until the year, 1965. Beginning with the period September, 1965, immediately after the Voting Rights Acts, these books were incomplete and names were not there.

We did make cards carried in Judge Herndon's file which had no classification—

Judge Godbold: Just a minute. What figure are you referring to?

Q. Numbers of Negroes registered voters in the County as opposed to the Federal Registrars? A. It will be in addition to the Federal Registration.

Judge Godbold: Proceed.

A. It will be up until the registrars took over.

Fred Wallace—for Plaintiffs—Direct

[192] Judge Godbold: Proceed.

A. I was at the point of the registration application, the bound volumes, the applications themselves.

We made demand to have various ledgers, which by law are to be kept by the Board of Registrars, and these were not produced; eventually, through an order of Judge Grooms, all the registration materials of the County were brought to the Marshal's office in Birmingham, and those registration materials included these ledgers which we had not had until that time, and that was in late January.

Now, working with those ledgers, which are divided by Beat and Box alphabetically and by year, and internally by months or date of registration, we went over our entire records to register voters in the Judge of Probate's file and designated as many as we could. Again they were complete all the way through until the period of September, 1965.

At that time, the chronological order broke down completely. The information on the registration file just stopped. Also the strict chronological and alphabetical order ceased at that time, too, **[193]** and the records became totally unintelligible.

I had my cards divided alphabetically and chronologically by date of registration. At the time, these voters, the period of September, 1965, had remaining 2,000 cards that were undesignated that fell in the period following September, 1965.

These cards at that time, as of January, were ordered chronologically by date of registration. The books became useless at that point, and I requested—I was under the impression something was missing, and I have found out since then what was missing were the books kept by the

Fred Wallace—for Plaintiffs—Direct

Federal Registrar, and apparently about which some testimony was given this morning.

My records as to race are complete up until the period of September, 1965. After that time I don't have the race. I have only names.

Now, I was only asked to do—I have not done a final compilation because I am still working on my list, but I was asked to determine how many Negro males had, up until that time, been registered, and these, of course, are to be added to the registrar's figures.

The Negro males—

[194] Judge Godbold: You are about to get down to figures?

A. Yes.

Judge Godbold: You are talking about a separation of Negro males from the records of voters up through September, 1965.

A. That is correct.

Judge Godbold: And the designation on that list is made on the basis of personal knowledge, or of information obtained by you?

A. From the files, yes.

Judge Godbold: From the files, or from external sources?

A. No, sir; I was looking for sources of racial designation.

Fred Wallace—for Plaintiffs—Direct

Judge Godbold: Do you mean the file you were studying or other files?

A. The ledger I referred to and the application also showed race, so all of my racial designations are from those.

Judge Godbold: Before the witness testifies to some figures which he is just about to be asked about, do the Defendants have any objection to his testimony [195] so far as this is concerned?

Mr. Hall: Yes, sir, we object to the relevancy, materiality and competency of this testimony with reference to the allegations in this complaint; it has no material bearing on whether the Jury Commission of Greene County, Alabama, has discriminated in placing the names of persons on the Jury Rolls and in the Jury Box of Greene County. The number of—

Judge Godbold: No need to argue, just state your objection.

Mr. Boggs: The further objection, may it please the court, it does not show whether they met qualifications of jurors. The voter qualification and the juror qualification are different matters. There are a number of differences in the law. It doesn't show who are illiterate, the other qualifications, or ages. They may be 80 something years old.

Judge Godbold: The objections to the predicate laid are overruled.

You may proceed.

Q. Would you tell us what your findings were? A. Well, you see, my figures showed that up to September, 1966—excuse me, 1965, there were 473 [196] Negro males reg-

Fred Wallace—for Plaintiffs—Cross

istered in Greene County. Now there is, if I might explain for the benefit of the court, in order to understand the difficulties which there are without figures, is that there is a hiatus period of a month, approximately, that is the Registrar—to my knowledge the Federal Registrars or Examiners were not in the County until November 8th, I believe, 1965. The County was designated on October 29th. Accordingly, the month of October is barren as to figures. Those would be numbers in addition to the total figures of 473 persons, the number of persons registered by the Federal Examiners, and there were two, I believe, registration days in October, 1965.

Mr. Jelinek: Nothing further from this witness.

Judge Godbold: Cross examination.

Cross Examination by Mr. Boggs:

Q. Did you examine those records to determine the ages, what age groups, or anything like that? A. As far as ages are concerned, of course, all the persons in my file are over the age of 21 years.

[197] Q. How about those over 65? A. As far as those who are over 65, I instructed my workers, and they did do this in compiling the list, to list the date of birth of any person both prior to 1910, and accordingly, that person—all persons over 65 would fall in that group.

I do have that information in my file as to the age of all persons over the age of, it would be 56, because my figures were completed in September of 1966.

Q. Do you recall what those figures show? A. No; I made no compilation as to that, so I could not tell you.

Q. Did you check any of the other qualifications of the ones who were literate, or the ones that were illiterate?

Fred Wallace—for Plaintiffs—Redirect

A. Well, as to the—I have had occasion to do that in relation to our own case. Now, it may give you some indication, I don't know what value it would be. I don't want to go into it unless I could explain fully what I did it for.

Judge Godbold: All you can do is answer the questions.

Q. All right.

[198] Judge Godbold: Do you desire to interrogate him about this, Mr. Boggs?

Mr. Boggs: All I want to find out if he did determine how many were illiterate and how many were literate.

Judge Godbold: Negro males, 65 and under?

A. No; I have no category of that sort.

Mr. Boggs: That is all.

Redirect Examination by Mr. Jelinek:

Q. You have those lists up to the time of the Voting Act, when it went into effect? A. Up to the period immediately after the effective date.

Q. Prior to that, was there a literacy requirement? A. Yes, there was. The person had to have—it is a matter of law; I don't mean to state the law.

Q. You are a lawyer, and you can give your opinion.

Judge Godbold: Again the court will ferret out questions of law. You don't need to prove it by oral testimony.

Miss Veit—for Plaintiffs—Direct

Q. These 473 were before the voting rights act went into effect? A. Except for those persons who were registered in [199] that one month of August.

Q. How many would that be, roughly can you tell us?

Mr. Banks: I object to any particular month.

Mr. Jelinek: It demonstrates literacy.

Judge Godbold: I think the court knows there are a substantial part of those 473 which would have been subject to State literacy requirements and would have been registered before the Voting Rights Act became effective.

Mr. Jelinek: That is all.

Judge Godbold: Step down.

(Witness excused.)

Mr. Jelinek: Miss Veit.

Being duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jelinek:

Q. Miss Veit, would you tell us who you are employed by? A. Lawyers Constitutional Defense Committee.

Q. And since what date? A. Approximately December 20th.

[200] Q. Since that time have you primarily spent your time in one particular job? A. Yes; I have.

Q. And will you tell the court what that job was? A. I attempted to go around to the Negro homes in Greene County, town to town, with a questionnaire.

Q. Tell us about it first? A. With this questionnaire—it had about seventeen or twenty questions on it, concerning names, ages, et cetera, I took this around.

Q. Do you have a copy of that questionnaire? A. Yes.

Miss Veit—for Plaintiffs—Direct

Mr. Jelinek: I would like to offer this copy into evidence, and perhaps offer a copy to the bench to look at.

(Plaintiff's Exhibit 20 received in evidence.)

Q. And how long did you conduct this survey? A. Since the 1st of January.

Q. Until— A. Until the end of May.

Q. 1966? A. 1967.

【201】Q. And prior to doing this, what was your education? A. I have a BA Degree in Sociology.

Q. When you were doing this survey, did you work alone the entire time? A. No.

Q. How long did you work alone? A. Until the 1st of April.

Q. After April, did other people work with you? A. Yes.

Q. Will you name some of those people? A. John Reynolds, Wilson Brown, Solomon Knight.

Q. Did you cover every house, every Negro home in Greene County? A. No.

Q. What was the manner in which you chose a home? A. We would start on a particular road, we had the road map, and we would go to each home, and if there was someone there, we would go through the questionnaire with them. If there was not someone there, we would try and go back.

Q. As a result of your work, did you obtain a large number of responses? 【202】 A. Yes.

Q. And do you have the responses with you? A. Yes.

Q. The originals now? A. The originals you have.

Q. Are these they? A. Yes.

Miss Veit—for Plaintiffs—Direct

Mr. Jelinek: We have a box of these I would like to offer into evidence; these are the file of questionnaires, Your Honor.

Mr. Hall: We object.

Judge Godbold: Is that all of it, or are there additional ones?

Mr. Jelinek: There is a box in front of me.

Mr. Hall: We object to the introduction of any and all of these questionnaires.

This young lady has testified she did not do all of this work herself; her testimony indicates that the information she gathered is purely hearsay, and it is incompetent, irrelevant and immaterial to the issues in this case; examination of the questionnaire itself will indicate that it has no bearing on the issues in this case.

[203] Judge Godbold: On the status of the predicate that has presently been laid, I think that the objection is good; there has been no testimony that those not filled out by her were filled out under her supervision, and the people who took them were trained, skilled and competent in any way.

She has testified as to her own qualifications, but as to the rest of them, the court is in the dark, except for the names of the people, we have no knowledge.

Q. Those you did, were they marked? A. Yes; I have my initial on them.

Q. What initial is that? A. V.

Q. Of those that were made by others, did they put their names on them? A. Yes; they put their initials, for the most part.

Miss Veit—for Plaintiffs—Direct

Q. Are these people here? A. Yes.

Q. The questions were based—am I correct, the questions were basically yes or no or a fact? A. Yes.

【204】Q. Did the question call for any opinions? A. No.

Q. Was it merely the matter of asking a question and getting an answer? A. Yes.

Judge Godbold: Were all of these taken by the surveyors in groups, or in separate cars?

A. We worked in separate cars.

Mr. Jelinek: Of course, each one will have to testify to his own work.

Judge Grooms: Have you got a compilation of the things she did?

Mr. Jelinek: No, but we have—

Judge Grooms: What is the object of this?

Mr. Jelinek: We have all the people here.

Judge Godbold: You have the other surveyors here?

A. Yes.

Mr. Jelinek: Yes, the box I would put in subject to the other people identifying theirs, and they are all here and this box represents their joint works.

Judge Grooms: Find out what she knows about hers.

【205】Judge Godbold: Let's see if we can shorten this in this way, perhaps by the court asking a few questions.

Miss Veit—for Plaintiffs—Direct

When you took all of these questionnaires to the home, Miss Veit, did you correctly enter on each form the answer which was given?

A. Yes, I entered just the answer that was given.

Judge Godbold: Did you instruct the person who was being questioned what answer you desired in any way?

A. Not other than to ask them what their age was.

Q. All right.

Judge Godbold: Did you suggest the answers you wanted?

A. No.

Judge Godbold: I think that would make the ones taken by Miss Veit admissible.

The only thing I know with respect to the other surveyors is to question them very briefly as to their procedures and competency in filling out these forms; perhaps we can examine one, and we may have to ask all of them.

[206] Judge Grooms: I am wondering if after they hear this witness, if the other witnesses would not give the same testimony with respect to the forms they filled out?

Judge Godbold: Is there any compilation of the results of the forms which you alone took, or are all of the forms compiled together?

A. State that again?

Miss Veit—for Plaintiffs—Direct

Judge Godbold: Is there a separate compilation of the results of the questionnaires which you alone took?

A. No, there is not.

Judge Allgood: Does that mean they are going to introduce each separate form and leave it up to the court to put them together?

Judge Godbold: Who were the other surveyors? Have them come around in front of the witness stand.

Speaking for the respondents, do you desire to question these other surveyors separately as to their qualifications and mode of procedure, and whether they correctly recorded the answers to the questionnaires—to the question, and as to any possible entries they may have made?

【207】 Mr. Banks: I am sure they would testify to the same thing the young lady did, they went out and asked questions.

They wrote the answers down.

Judge Godbold: I think it can reasonably be expected they would give the same answers; if you desire to cross examine them to any extent, the court certainly will not cut you off on it.

You are fully entitled to it.

Mr. Boggs: I think they should be questioned to some extent.

Judge Godbold: Take your seat.

Judge Allgood: I want to be sure in my own mind where we are going.

Judge Grooms: What does the survey show?

Are all the results of the survey to be shown?

John Reynolds—for Plaintiffs—Direct

Mr. Jelinek: Absolutely not. Large portions of the survey are not relevant to this case.

Judge Allgood: A large portion?

Mr. Jelinek: Is not relevant to the case.

Judge Allgood: I think they would all be relevant, if we are going to look at any part of it.

Mr. Jelinek: I am not trying to hide any of it.

[208] Judge Allgood: It might affect my thinking.

Mr. Jelinek: We offer it altogether. We have compiled the data in terms of who can read English, if not convicted of a crime, and is registered; who cannot read English, but is a landowner.

Judge Godbold: Let's proceed; let's take Mr. Reynolds next and Miss Veit can sit down and we will call her back to the stand, and we will take Mr. Reynolds next.

(Witness excused.)

JOHN REYNOLDS, being duly sworn, was examined and testified as follows:

Mr. Jelinek: Perhaps we can stipulate he will testify the same and have cross examination.

Judge Godbold: Is that satisfactory?

Mr. Bradley: Yes, sir.

Judge Godbold: Tell me, the method for taking the survey and the procedure and the accuracy and the fact that he probably took down the answer, your testimony would be the same as Miss Veit.

The defendant may cross examine.

[209] Judge Grooms: What is your name?

A. John Reynolds.

*John Reynolds—for Plaintiffs—Cross**Cross Examination by Mr. Boggs:*

Q. Who employed you to do this work? A. I am a worker, and I work for different organizations, that have work to get done.

Q. What organization employed you, and paid you to do this work? A. I be paid at certain times by Southern Christian Leadership Conference, and other times I would do it voluntarily.

Mr. Jelinek: He means in this case.

A. In this case, the Lawyers Constitutional Defense Committee.

Q. That is the same one that Miss Veit was employed by?

A. Yes, sir.

Q. That is the same one Mr. Jelinek is employed by?

A. Yes, sir.

Q. Mr. Jelinek got you to do this work; is that correct?

A. No, not exactly.

【210】Q. Did he consult with you and consult with you about it from time to time? A. Well, I called Mr. Jelinek on occasions on my own, and he mentioned to me there may be a possible job, and that he knew someone that could fill me in on it.

Q. Where is your home; do you reside in Greene County?

A. No.

Q. Where do you live? A. Greensboro, Hale County.

Q. What is your name? A. John Reynolds.

Q. What kind of case—was it a civil case or criminal case?

Mr. Jelinek: I object to that, Your Honor.

Judge Godbold: I think this is legitimate cross

John Reynolds—for Plaintiffs—Cross

examination.

Mr. Jelinek: It is a confidential matter between client and attorney.

Judge Godbold: He volunteered it; he is just asking the nature of the case.

Q. Was it a civil case or a criminal case? [211] A. They say—criminal case.

Q. When was this you made the examination, carried these around, during what month in the year? A. From, I would say, the first of April, 1967, through May.

Q. Of what year? A. 1967, of this year.

Q. From April until what time? A. The latter part of May.

Q. Up until here recently? A. Yes, sir.

Q. And what test did you give the people to determine whether they could read or write? A. I didn't understand.

Q. Did you just ask them could they read or write? A. Yes, and—yes, sir.

Q. You just asked them could they read or write? A. Yes, sir.

Q. If they said they could write, you put down they could write, and they were literate? A. If they said they could write, I took their word for it.

Q. You did not give them any test whatever for it? [212] A. No.

Q. And sometimes, when you say the people weren't at home, did you ask anybody else to give you information those people themselves didn't give you? A. No.

Q. You saw each individual yourself and talked to him or to her? A. You said the people I went out to interview, if they weren't home at the time, I went on to somebody else's, and I would try to double back.

John Reynolds—for Plaintiffs—Cross

Q. You didn't get them to sign their name and see if they could write themselves, did you? A. No, sir.

Q. You just asked the questions and put down what they told you? A. Yes, sir.

Q. Did you give them any leads, say, you can read a little bit, can't you, or words like that? A. No.

Q. How would you question them? A. I would say it—first of all I told my name and sort of gave them an explanation this was a questionnaire and proceeded to ask the questions.

[213] Q. You don't know whether they told you the truth, or whether they told you something else?

Mr. Jelinek: I object to that; that is the third time he has been through that.

Judge Godbold: That is obvious, Mr. Boggs.

Mr. Boggs: Do you sustain the objection, or overrule it.

Judge Godbold: I indicated it was of no consequence.

Q. Did you talk to the husband and wife, or sometimes just one of them, and one of them give you information about the other? A. On occasions; yes, sir.

Q. On occasions, you talked to one of them? A. Yes.

Q. Did they give you information about the other? A. Yes.

Q. You didn't interview each person individually? A. I interviewed each person that was there. But in the case of husband and wife, I interviewed the wife, because I was sure she knew her husband.

Q. In many cases you didn't interview each person, but in the case of husband and wife you filled out the **[214]** interview for just one; is that right? A. Yes.

John Reynolds—for Plaintiffs—Redirect

Mr. Boggs: That is all.

Redirect Examination by Mr. Jelinek:

Q. Were you charged for carrying a sign saying, don't purchase here, the Klan owns it?

Mr. Boggs: We object.

Judge Godbold: Don't go into it unless you are prepared fully to go into it.

Mr. Jelinek: They went into it, Your Honor.

Q. I will ask that question and let it go at that; is it charging something to that extent? A. Yes.

Mr. Jelinek: No further questions.

Judge Godbold: Any further questions?

Mr. Boggs: No.

(Witness excused.)

Judge Godbold: All right. Let's take the other surveyor.

Mr. Bradley: I would like to present a matter to the court's attention.

I have been informed ex-Governor Wallace has [215] been served with an instanter subpoena, and I would like to know from the court if I am to advise him to come up so that he can testify, or just what is the situation.

Judge Godbold: I don't think he can testify to-day, because it is clear we are not going to be through.

Judge Allgood: Is there any chance of getting through with Governor Wallace's testimony? Do you insist on it?

Colloquy

Mr. Jelinek: We haven't touched the question about the composition of the Jury Commission.

Judge Allgood: Could you take a deposition from the governor just as well, and let's go ahead and finish this case today?

Mr. Jelinek: With all respect, I don't believe that a deposition would substitute for cross examination before the court; I don't like to put the court out, and I will certainly be willing to go as late as Your Honors would want this evening, but I feel on behalf of my client —

Judge Allgood: He has just been served; I personally would not—it is ten minutes to five, [216] I would not ask him to come up today and testify. If he is going to have to testify, we will have to go ahead into tomorrow with this case; I was in hopes we could finish it.

Mr. Boggs: Mr. Banks is in the reserve, and we had a plane fly him here; and we have a plane coming in in the morning; could we take his testimony so he can get back?

Mr. Jelinek: May I make the same request of the witness flown in from Philadelphia.

He would like to fly out.

Judge Godbold: Is this a person in Military Service?

Mr. Jelinek: No.

Judge Godbold: That request will be denied; we will take Mr. Banks, and when his testimony is completed, we will adjourn court until in the morning at 9 o'clock.

How long do you anticipate the testimony of Mr. Banks would be?

Colloquy

Mr. Boggs: Just a few minutes; I don't think it would be very long.

Judge Godbold: Are you going to put Mr. Durette [217] on the stand?

Mr. Boggs: No, sir.

Judge Godbold: Are you, Mr. Jelinek?

Mr. Jelinek: No.

Judge Godbold: Mr. Durette, you are excused.

Mr. Jelinek: May we ask that the other surveyor—

Judge Grooms: We might agree that his cross examination would be the same as the one who just testified.

Mr. Hall: Yes, sir, that would be all right.

Judge Godbold: Let the record show the testimony of the other surveyor, Wilson Brown, would be the same predicate as Miss Veit, and his answers on cross examination would be the same as the answers on cross examination of John Reynolds, in substance, and with that, he can be excused.

Now, that disposes of everybody except Mr. Banks.

Mr. Jelinek: Yes, sir.

Judge Godbold: Mr. Jelinek, who will you have to put on in the morning?

Mr. Jelinek: Miss Veit.

I beg the court's indulgence, but I wonder if after Mr. Banks' evidence, I could have ten minutes [218] with my statistician who informs me he is not going to be able to stay over night, and he had to come because he compiled the figures.

Judge Allgood: Why don't you agree to take the deposition of the Governor and go ahead and finish the case today.

Colloquy

We have excused everybody; you are not going to get anywhere with Governor Wallace on cross examination. It will be like butting your head against a brick wall.

Mr. Bradley: We have offered to stipulate almost everything except the ultimate question, and we are not going to do that.

Judge Godbold: We will leave it with this, we will take Mr. Banks and we will recess for tonight.

Mr. Jelinek: Your Honor, if I could take more than a yes or no just a moment.

We went to great time and expense to produce this statistician; we subpoenaed ex-Governor Wallace to be here this morning; you have the records whereby he designated somebody else to accept the subpoena. I don't believe we should be penalized to this extent. I ask that we be given the right to exercise our [219] rights of cross examining the Governor, and we ask this court to give us a mere fifteen minutes of your time on the witness who has flown from Philadelphia.

Mr. Hall: It will take more than fifteen minutes, because I know this man, because I have had him in court before.

Judge Godbold: The court adheres to the position, if we are to go until in the morning, which is all right with the court, that we will go over with all the witnesses. If we are going to finish tonight, fine.

If your statistician cannot be here in the morning, the court will give you a reasonable opportunity to take his deposition.

Ralph Banks, Jr.—for Defendants—Direct

Mr. Jelinek: Thank you, Your Honor. That is what we will do.

Judge Godbold: Mr. Bradley, I would suggest that you have former Governor Wallace here at 9:30 in the morning. There will be some other testimony before we get to him.

Shall we proceed with Mr. Banks?

RALPH BANKS, JR., being first duly sworn, testified as follows:

[220] *Direct Examination by Mr. Boggs:*

Q. State your name, please, sir? A. Ralph Banks, Jr.

Q. What is your occupation? A. I am a lawyer.

Q. What is your age? A. I am 43.

Q. Where do you live? A. Eutaw, Alabama.

Q. Do you also occupy the position of County Solicitor of Greene County, Alabama? A. Yes, sir.

Q. You have occupied that for how long? A. The last ten years.

Q. And you also are in the reserve, a Major in the reserve? A. Yes, sir.

Q. And you are at the present time in camp, you left by plane to get here, and a plane is to take you back in the morning; is that right? A. Yes, sir.

Q. During this time, have you had a wide acquaintance with the people, both white and Negro, in Greene County?

[221] A. During the last nineteen years, yes, sir.

Q. Will you tell us how you have gained that contact, how you have come in contact with people? A. I have been practicing law in Greene County for nineteen years, been county solicitor for the last ten, and in 1950, I super-

Ralph Banks, Jr.—for Defendants—Direct

vised the taking of the United States Census in Greene County.

Judge Grooms: Is Solicitor an elective office, or appointive.

Q. Are you so familiar with the people in Greene County you can look at a venire and know practically every person on there, whether they are Negro or white? A. Yes, sir.

Q. Are you familiar with the 1960 official census of the United States and know whether they are Negro? A. Of Greene County?

Q. Of Greene County? A. 1950 and 1960, yes, sir.

Q. Are you familiar with the 1960 census that was taken? A. Yes, sir.

Q. Since 1960, do you know of your own personal [222] knowledge whether migration, large migration of Negroes from Greene County has taken place? A. Yes, sir, there has been.

Q. Will you explain that? A. In the past Census, the farm population or the number of farmers in the County has been within one or two percentage points of the population in relation to race and ratio; there was around 81%, I believe, in 1960, and the Negro population was 82%.

In 1964, the farm census showed—I beg your pardon, they published a list in 1965, in the Greene County Democrat of farmers eligible to vote in the ASCS Election, and in that list, population shows 65% approximately were Negro from my own study of the list.

Generally the farm population showed the ratio of Negroes to white following the general population of Negroes

Ralph Banks, Jr.—for Defendants—Direct

to white indicated it had declined from 82% to 62% to 65%, in my judgment.

Q. What is the principal cause of this migration from Greene County? A. The fact that cotton farming on a small scale is out because you can't make a living without a large [223] investment, and using cotton pickers to pick the cotton, and chemicals to cultivate it instead of having to chop it, and some industries we have had, back in 1944, there were 32 sawmills in the county.

Q. The principal workers in the sawmill, who were they, Negroes or whites? A. They were Negro.

Q. All right. A. And at present, there are two sawmills in Greene County in operation, and two veneer mills.

There is considerably less opportunity for employment though there has been one small industry locate in Greene County in the last year.

Q. In the year 1965, approximately, if you know, approximately who raised 75% of the cotton with what help? A. There was approximately one dozen white men in that year who raised 75% of the cotton in Greene County, and they used chemicals, crop dusters, planes, and cotton pickers; they used a lot less labor than they had in the past; there is no opportunity for them now in the county compared to what was in the past.

Q. Is it your logical conclusion from your observation—

[224] Mr. Jelinek: It sounds like a leading question is coming; could we give the witness an opportunity to hold his answer.

We would also like to know if the witness is reading from a paper?

A. No, sir.

Ralph Banks, Jr.—for Defendants—Direct

Q. All right.

Judge Godbold: Go ahead.

Q. I believe you have testified to this in your opinion—

Judge Godbold: If he has testified to it, let us jump over it.

Q. 62% Negro and 38% white constitutes the population of the County now; is that your opinion? A. Around that.

Q. And from this migration, what age group migrates? It is the young educated ones who are able to go off to other places to better employment.

Q. And the ones left are largely children in the community, and real old people? A. Yes, sir.

【225】Q. Now, Mr. Banks, were you present when the jury was drawn that constitutes the venire of court, the Grand Jury, and the civil week which is one and the same; and also the criminal trial week jury? A. Yes, sir, I would say most of the time.

Q. And how is it drawn? A. Well, it is drawn from the box with the cards in it by Judge Hildreth.

Q. Is that in open court? A. In open court in the Clerk's office.

Q. Anyone who desires to come in, the door is not shut or anything? A. No, sir, except when the weather is cool, it is closed.

Q. But it is done in open court? A. Yes, sir.

Q. According to the code? A. Yes, sir.

Q. And Judge Hildreth conducts this, and if someone desires to come in, they could come in, they never have been excluded, have they? A. No, sir.

Ralph Banks, Jr.—for Defendants—Direct

Q. These lists of convictions here, I believe they [226] have introduced a copy of this in evidence? A. No, sir, this is the one that was prepared in Mrs. Yarbrough's office.

Q. That was prepared by Mrs. Yarbrough's office? A. Yes, sir.

Mr. Boggs: All right.

Judge Grooms: Is this the one you checked with her?

A. I did the checking.

Judge Godbold: How have you marked it?

A. Judge, the ones who were white residents in Greene County, I put a line opposite his name; there—if there was a question about it being a resident, I put a question mark to the right; if they were non-resident, I marked it NR.

This covers from the Spring Criminal Docket in 1956 through the Spring Criminal Docket in 1967.

And Mrs. Yarbrough has got a lot of convictions in here that are not disqualifying, but if you want to go through that—

Judge Grooms: Have you marked off white people?

A. I have marked white people. Like this man, I am not positive he was a resident of Greene County at [227] the time. This man was; two cases against this man, he is a resident of the County, these two. There are approximately sixteen or seventeen white names.

Ralph Banks, Jr.—for Defendants—Direct

Judge Grooms: They are the ones checked on the left margin?

A. Yes, sir, residents of Greene County in those twelve pages.

Q. And those are convictions in Greene County? A. Yes, sir; and a Negro non-resident convicted of a crime, I scratched his name off the list.

Judge Godbold: The name not marked with anything and not struck through would be a Negro resident of Greene County convicted of events shown on the list?

A. Yes, sir.

Mr. Boggs: We wish to offer that in evidence, may it please the court.

Mr. Jelinek: May I see it, please?

(Defendant's Exhibit 2 received in evidence.)

Q. Now, McShan that was testifying this morning, does it show a conviction on him? A. Not on here. He was convicted in the Justice of the Peace court.

[228] Mr. Billingsley: We object to that statement about his conviction, unless Mr. Banks can show why the proper reference—

Judge Godbold: I think the best evidence of his conviction in the Justice of the Peace Court would be the records of the court.

Mr. Boggs: Would you let us admit that in the morning in evidence?

Ralph Banks, Jr.—for Defendants—Cross

Judge Godbold: We will be here in the morning and take any evidence you want to submit.

Mr. Boggs: That is all.

Cross Examination by Mr. Jelinek:

Q. Mr. Banks, did I understand you to testify Judge Hildreth chose the venire list in open court in the courtroom? A. He doesn't choose the venire, he picks the venire.

Q. Is that in the courtroom or in the clerk's office? A. When he draws a special venire it is in the courtroom. When he draws the regular venire for the regular term of court, it is in the clerk's office. There is no need to go upstairs for that purpose.

[229] Q. In the Fall of 1966, when he drew these venires, did he draw or pick these lists in Mrs. Yarbrough's office? A. In my best opinion, he did.

Q. Now, do you have any figures about migration; do you yourself know what the migration has been? A. As to figures?

Q. Yes. A. Other than what I testified to; no, sir.

Q. Is this based on your estimate? A. It is based on my judgment from studying the past census and comparing them with the 1964 farm census.

Q. Do you have the 1964 farm census? A. Not with me.

Q. Your testimony is you think— A. I beg your pardon, Mr. Jelinek, it was the list of farmers authorized to vote in the ASCS Election, not the farm census.

Q. That is what you base knowledge on, the ASCS list? A. Yes, sir.

Q. Are you aware that the Civil Rights Commission [230] is now investigating the fact that Negroes' names

Ralph Banks, Jr.—for Defendants—Cross

were left off the ASCS List? A. Not a bit.

Q. If, in fact, Negro names were left off the ASCS list, that would change the migration? A. They were not left off.

Q. If they were in fact left off, this would change your figures? A. Naturally.

Q. The 65% figures, is that your thinking the next Negro population is 62% of Negro males? A. The Negro population is in the vicinity of 62-65% based on the ASCS poll.

Q. What do you think the male population is? A. I would say it would be smaller than female.

Q. Do you know the number of children who have reached the age of 21 in the four years since 1960? A. Since when?

Q. 1960? A. That are in Greene County now?

Q. That's right. A. I don't know how many are there.

Q. Is it possible that the number of minors who [231] have reached majority may have changed the migration you have taken from the ASCS figure? A. They are the ones who generally migrate.

Q. This is based on the ASCS Figures, how would that indicate this? A. The minors?

Q. To be on an ASCS list, very often only the father gets on the list; is that not correct? A. The father?

Q. If a father owns a piece of land, he can be on the ASCS list, and he can have a son 21 who is not—they could not be owners, and they could not be on the ASCS list? A. My understanding is that the man who is farming on his own operation, he can be on the list; if he owns land with his father, he could be.

Q. These ASCS Figures, do they include men and women? A. Yes.

Ralph Banks, Jr.—for Defendants—Cross

Q. Now, the—is it not true that there are extremely small numbers of Negro women as opposed to Negro men on the list?

I withdraw that.

Is it not true there are many more Negro men on [232] the list than women? A. There are fewer Negro women on the list than men.

Q. Are you aware that Negro women do not get ASCS votes because they are not considered owners of the land as white women are? A. If the wife owns the land, she votes.

Mr. Jelinek: I have no further questions.

Mr. Boggs: That is all.

(Witness excused.)

Mr. Jelinek: Before we conclude, may I ask the opportunity to see the information that was brought in reference to the subpoena with reference to ex-Governor Wallace about the data from his office, which counsel said he brought to this court today, and might I also have the opportunity to work with the figures Mr. Banks has offered in evidence.

I know the court is going to leave now, but before doing so, I would like to work with those two documents.

Judge Godbold: Mr. Bradley, would you have any objection to leaving those documents with Mr. Jelinek?

[233] Mr. Bradley: No, sir, I would not.

Judge Godbold: Produce the papers for Mr. Jelinek's examination, and do whatever you want to with it.

Colloquy

The figures that Defendant's Exhibit 2 contain, which is the list of convictions marked by Mr. Banks, I will instruct the clerk to allow Mr. Jelinek to withdraw it and have it for their use.

Mr. Hall: There is one other little point before we adjourn, there was some question raised about the propriety of the Judge drawing the jury list in the clerk's office. I would like to refer the court to the case of Rush versus State, 253, Ala.

Judge Godbold: I have already told Mr. Jelinek there is a case on that, and it is the Rush case.

Court will be in recess until 9 o'clock in the morning.

(Whereupon, court was in recess from 5:15 p.m., June 6, 1967, until 9:15 a.m., June 7, 1967, when the following proceedings were had and done:)

MORNING SESSION

9:15 a.m.

June 7, 1967.

Judge Godbold: Before we proceed with anything [234] further, the attorneys for former Governor Wallace have filed a motion to quash the subpoena served on him later yesterday.

Do you have a copy of that, Mr. Jelinek?

Mr. Jelinek: I have, Your Honor.

Judge Godbold: And is the return—you want to be heard on this, Mr. Bradley.

Mr. Bradley: May it please the court, the motion to quash the second subpoena has been filed with the court, and Mr. Stan Sikes, who is a practicing attorney in Montgomery, and who is also present

Colloquy

recording secretary in the Governor's office is here to present the argument on the motion to quash on behalf of the Governor, George C. Wallace.

Judge Godbold: We will be happy to hear from Mr. Sikes.

Mr. Sikes: If it please this honorable court, I am admitted to the practice before the Middle District.

Judge Godbold: We are aware of that.

Mr. Sikes: This court has a copy of the motion.

Judge Godbold: Yes, sir.

Mr. Sikes: Basically, the motion to quash presents **[235]** two questions.

First is service of said subpoena was not accompanied by a tender of fees and mileage which is required by Rule 45, I believe sub-section C. And we would offer to prove same by calling the deputy United States Marshal who served the subpoena, if your Honor would like to hear from him.

Judge Grooms: No dispute about that.

Judge Godbold: The face of the return shows no tender.

Mr. Sikes: Yes, sir.

Judge Godbold: Go ahead.

Mr. Sikes: We feel that this is certainly adequate grounds for quashing the subpoena.

Further, by way of background, we are informed and believe that the plaintiffs herein will seek to elicit information from the former governor that is privileged and is not subject to inquiry by this Honorable Court or any other court, that being the nature of the decision making process of the Chief Executive of the State of Alabama or any other Chief Executive of any other state. If I may state to the court—

Colloquy

[236] Judge Godbold: Mr. Sikes, at the moment, I don't know if there is any reason to go into this second question until we settle the question about the tender.

Mr. Sikes: Yes, sir, Your Honor.

Judge Godbold: And, Mr. Jelinek, you want to be heard about the failure to tender the witness the mileage fee and the effect thereof.

Mr. Jelinek: Your Honor, I would like to have the Deputy called; I would like to find out if he has been serving these processes ten, twenty years, and whether he ever failed to tender fees before, whether in fact he offered the fees, and whether they were refused.

I would like to have all the background. In all my years of practice, this is the first witness that ever failed to appear twice with two marshals serving him directly.

Judge Godbold: Your subpoena was quashed on technical grounds. You made some remark during the proceeding indicating in some way the court had abused you by quashing the service before. That first service of first subpoena was not valid and **[237]** it was quashed on proper grounds; now, the question before us is whether this second motion to quash is or is not properly taken; now, the rule requires a tender be made. So certainly you and the lawyers and the court want to know if a tender was or was not made.

Mr. Jelinek: I wonder if I might see the return, Your Honor.

Judge Godbold: Yes, sir.

Colloquy

Mr. Jelinek: Yes, sir, thank you.

Judge Godbold: Do you know whether the plaintiffs deposited with the Clerk the required tender?

Mr. Jelinek: No. Your Honor ordered this subpoena yesterday, the second subpoena. The only subpoena that we tendered, the only money we tendered was that which was requested by the Marshal to the first set of subpoenas that went out.

Judge Godbold: No, sir, we ordered the Marshal to get out a subpoena at your request.

Mr. Jelinek: That is correct, Your Honor.

Judge Godbold: For instanter attendance.

Mr. Jelinek: That is correct, Your Honor. Since this case began, a couple of hundred dollars [238] for all the subpoenas in the case has been tendered to the Marshal, and I think where there was an excess, we have a regular account with him, and this has been done in the past.

Judge Godbold: I would like to have the Marshal called.

I think you are entitled to interrogate the marshal on the question of whether in fact a tender was made as shown on the face of the return.

And if he is available—

Judge Allgood: That's only dealing with now.

Judge Godbold: We are not going into what he has done in previous cases, whether he has or has not tendered in other cases. Regardless of how the court may feel about it, it does not change the requirement of rule 45.

Mr. Jelinek: I would also like to ask the court to resubpoena the governor immediately.

Judge Godbold: We are going to conclude here

Colloquy

very shortly, and I doubt if you are going to hold up the proceedings for any further subpoena.

Mr. Jelinek: Your Honor, if I may, I think that this witness has got away with something which no **[239]** other witness has. I don't mean by this court, I mean by his violation—

Mr. Sikes: We object to those remarks.

Judge Godbold: Mr. Jelinek, just take your seat.

Mr. Sikes: Thank you, sir.

Judge Godbold, I would like—

Judge Godbold: I will say to you again that when a valid subpoena is issued, and validly served this court will protect your rights to the full extent of its powers. Unless and until a valid subpoena is issued and served in the manner required by law, this court will not exceed the requirements of the rules for you, Mr. Bradley, the Governor or anybody else. Whoever is involved, the rules will have to be complied with.

Mr. Jelinek: If Your Honor will—I am sorry.

Judge Godbold: If you will confine your remarks to that context, we will all do better.

Mr. Jelinek: If Your Honor will permit—

Judge Godbold: Now, will you call the Marshal.

The Clerk: He is on the way.

Judge Godbold: He is on the way.

[240] Mr. Jelinek: If your Honor will permit, I think that in light of the bad faith involved in what has proceeded with these subpoenas—

Judge Godbold: Now, Mr. Jelinek, I am going to make it clear to you again and this is the last time I am going to make it clear to you; nobody has proved any bad faith to this court today. Until you

Colloquy

prove some bad faith, any remark like that is completely out of keeping in this courtroom.

Mr. Jelinek: As a matter of evidence in your Honor's file, is that the same Marshal that the Governor directed—

Judge Allgood: I wouldn't argue with the court about that point; we have heard enough from you about it, Mr. Jelinek, as far as I am concerned.

Mr. Jelinek: I would like to make a request under the circumstances that have transpired, that this court be reconvened at such time that the Governor is properly subpoenaed.

Judge Godbold: No, sir, we are going to complete this case. Two subpoenas have been issued, if this one is valid, that is before us now, within the full limits of its powers, the court will enforce it. [241] We are not going to subpoena and resubpoena and convene and reconvene. We have given you already the privilege of a second instanter subpoena, which is a right serious step for the court to take, and if that is ineffective and was not properly served, it—I am sure the court is not going to hold up proceedings to keep this procedure up. If this subpoena is valid, which we will determine here in a few minutes, we will do everything we can to enforce it; if it is not valid, then I think it is a matter that is going to stop there.

The Clerk: Do you want to swear this witness?

Judge Godbold: Please.

Do you want to proceed, Mr. Jelinek?

Mr. Jelinek: Yes, Your Honor.

J. H. Stephens—for Plaintiffs—Direct

MR. J. H. STEPHENS, called as a witness, being duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jelinek:

Q. Is your name J. H. Stephens? A. Yes, sir.

Q. And you are a deputy U. S. Marshal? [242] A. That's correct.

Q. Did you serve this subpoena on George C. Wallace yesterday? A. Yes, I did.

Q. Would you tell us the background of your service and reference to the fees for the non-service? A. I am sorry, I didn't understand the question.

Q. Did you serve the Governor personally? A. Yes, sir, I did.

Q. All right. A. I served the Governor personally.

Q. Did you tender any fees to him? A. I did not.

Q. Would you tell the court why not? A. I am not sure that I know why.

Q. Anybody tell you not to serve the fees? A. The fees weren't enclosed.

Q. Did you ever serve a subpoena without fees before? A. Yes, sir, I have.

Q. Did the witness appear? A. I have no way of knowing.

Q. Are you aware that fees, tender of fees for [243] attendance and mileage are required with a subpoena? A. I believe so.

Q. Are you aware that such service without such fees is a nullity?

Judge Grooms: Wouldn't be a nullity as far as the services by the Government.

J. H. Stephens—for Plaintiffs—Direct

Q. Were you aware that such service on behalf of private persons would be a nullity?

Mr. Sikes: We object to that question.

Judge Allgood: This witness is a U. S. Marshal, he is not a lawyer; he is not entitled to know, he doesn't know.

Judge Godbold: That is sustained.

Q. Have you received any training about the fees with reference to serving subpoenas? A. I—

Mr. Sikes: We object.

Judge Godbold: I will sustain. Let's establish the facts, Mr. Jelinek.

Mr. Jelinek: I think the facts are very clear; no further questions.

Mr. Sikes: I have no questions of Mr. Stephens, Your Honor.

[244] Judge Godbold: I think you said the facts are clear. The court has no alternative except to grant the motion to quash.

Mr. Sikes: Thank you, Your Honor.

Judge Godbold: The motion is granted on failure to tender the fees as required by law; now, Mr. Bradley.

Mr. Bradley: Yes, sir.

Judge Godbold: The Court desires that the matters which you have previously stated to the court would be the subject of stipulation between you and Mr. Jelinek. Has that stipulation been effectuated to cover the items which you and he previously—to the extent you and he were previously in agreement on?

Colloquy

Mr. Bradley: All right.

Judge Godbold: And I would suggest the court, or the court would desire upon the conclusion of taking of oral testimony today, that you and Mr. Jelinek work out whatever written stipulation covering the points between you that have been agreed upon be reduced to writing and filed with the court before you separate so this would not be the subject of [245] extended delay, and correspondence and negotiations. And if in trying to get that stipulation in effect or agreed upon, and you get in a situation where the court can be of help, let us know, and we will do what we can.

Mr. Bradley: Yes, sir.

Judge Godbold: But at least to that extent, the court will get the benefit of what is known.

Mr. Bradley: Yes, sir.

The Court: All right, let's proceed from here, Mr. Jelinek.

Mr. Jelinek: Your Honor, if counsel has discussed any stipulation with you, I don't know if he has; I don't know specifically what is referred to; I presented to them what evidence we had, and I got a vague idea of what was acceptable.

Judge Godbold: Well, Mr. Bradley has stated to me, and has also stated he filed with me a motion to quash, and also as I understand it, stated in open court yesterday that the respondents would stipulate to the appointment that had been made, the jury commission, that no Negroes had been appointed through the mechanics of these appointments. Now, I hope we [246] can avoid the necessity for going back into the stenographer's notes to show

Colloquy

the details of what Mr. Bradley stated to the court would be agreed upon; I would prefer this be worked out between counsel.

Mr. Jelinek: I think stipulation can be avoided completely; it is impossible to prove this without Governor Wallace being present. I think the stipulation would be of no use whatever.

Judge Godbold: If you don't desire that, there is no use in pursuing it.

Mr. Jelinek: I wondered if I could call a five minute recess.

Judge Godbold: Surely.

(Whereupon, proceedings were in recess from 9:25 a.m., until 9:30 a.m., following which the following occurred:)

Judge Godbold: Let's proceed, Mr. Jelinek.

Mr. Jelinek: I would like to call upon the defendant to produce the alleged conviction record of Mr. McShan from the J. P. Court.

Mr. Boggs: We attempted to get it last night; we understand that such a record does exist and we could not obtain such copy last night, but we can if **[247]** the court desires to have it in a day or two; nobody was there, the Judge wasn't there to prepare it for us last night.

Judge Godbold: Well, in the situation of the testimony now, all the court knows is that Rev. McShan has testified in this hearing and states that he does not recall any such conviction; that is the only evidence before the court; therefore, Mr. Jelinek, at this stage, are you asking for the conviction record? If you desire the record, well, the court will allow it

Colloquy

to be late filed and be in certified form; if you do not desire the record, then the problem is going to be up to the defendants as to whether they get it here and get it filed.

Mr. Jelinek: Your Honor, I think that the production or failure of production is something that the court should be aware of, because it involves the veracity of one or two witnesses, Mr. McShan on one hand, or Mr. Banks on the other; I think that copies should be produced for the court; I would like to direct a photostatic copy be sent to my office and that we be permitted to respond in writing to whatever is sent to us or may be sent to us in writing to your [248] Honor, of course.

Judge Godbold: I don't know any way that we can hold the matter open for the taking of additional testimony on this item; now, the court will direct that within ten days, the respondents file with the court certified copy of the court record.

Mr. Boggs: Yes, sir, it will be done.

The Court: That is alleged to relate to this particular witness. If there is no such record, it is to be filed within the court within the same period, the certificate that the Alabama statute provides for to be made by the custodian of the records where he searches his records and where he doesn't find anything; either file the certificate or the certificate that he can't find any record; file that with the court within ten days and send Mr. Jelinek a copy of it.

Mr. Boggs: Yes, sir.

Mr. Banks informed me he was present when the conviction—

Judge Godbold: Never mind about that; the only thing that is admissible is the best evidence.

Colloquy

Mr. Boggs: Yes, sir.

All right.

[249] Mr. Jelinek: I would like to return Defendant's Exhibit 2, the convictions that were testified to by Mr. Banks.

Judge Godbold: Just hand it back to the clerk; that is the man you got it from.

Mr. Jelinek: I would like to make an offer in reference to it, Your Honor.

Judge Godbold: All right.

Mr. Jelinek: Once again, the evidence is before Your Honor, in the form that I would like to state that on computing the number of Negroes who are now residents or number of Negroes who are residents of the county of Greene, it is 59% of this felony list, not 96%.

Judge Godbold: Well, I think that would appropriately be an argument in the briefs. We are going to ask you to brief the facts, and that would help us if you drew that conclusion in your brief.

Mr. Jelinek: Kathy Veit.

Judge Godbold: Just a minute—my recollection is that we finished the direct on Miss Veit on her mode of taking the survey.

Mr. Jelinek: Well, she has a lot more to testify about, Your Honor.

[250] Judge Godbold: On what now, anymore on the mode of taking the survey.

Mr. Jelinek: Oh, no, Your Honor.

Judge Godbold: That's all I want to make clear.

Mr. Jelinek: Do you want her to be crossed at this stage?

Judge Godbold: No.

Colloquy

Mr. Jelinek: And at this point I offer the survey sheet into evidence.

Judge Godbold: All right.

Now, you have produced three surveys.

Mr. Jelinek: That's correct.

Judge Godbold: Was there a fourth one, or am I mistaken?

Mr. Jelinek: There is a fourth one, Mr. McShan.

Judge Godbold: Is he available?

Mr. Jelinek: No, sir.

Judge Godbold: Not to testify.

Mr. Jelinek: That's correct.

Judge Godbold: I think you will have to pull his out.

Mr. Jelinek: That can be done.

[251] Judge Godbold: The court rules that you have laid sufficient predicate to introduce the survey questionnaires of those people who have appeared and testified. Without this testimony to lay a predicate, we could not admit his; we will admit all of the survey questionnaires subject to your withdrawing those made by, what is his name?

Mr. Jelinek: Mr. Knight, K-N-I-G-H-T.

Now, may we offer them into evidence in a sack and may we put them in—may we pull them subsequently or how would you want to handle it?

Judge Godbold: Offer them all in a group and let the clerk mark them in a group.

Before you leave today, withdraw all of those made by Mr. Knight.

(Plaintiff's Exhibit 21 received in evidence.)

Kathleen Veit—for Plaintiffs—Direct

KATHLEEN VEIT, thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Jelinek (continued):

Q. Now, did you make compilation based upon the surveys collected that have been offered [252] into evidence?

A. Yes, I did.

Q. And would you tell the court how you made the compilations? A. We typed up lists of the names in three different groups for both male and female groups. One were those that read English and have no criminal conviction, and are registered to vote; Group 1-A, can read English, have no criminal conviction, and are not registered to vote.

Q. How many in this group read English and have no criminal conviction and are not registered to vote?

Judge Godbold: Are those included by Knight?

Mr. Jelinek: Yes.

Mr. Bradley: We object.

Judge Allgood: Can you furnish that information in brief, reducing the totals. You haven't computed the totals.

Judge Goldbold: The problem at the minute, these calculations, as I understand, are based on all of the survey questionnaires and those taken by Knight. There is no way to admit them into evidence because they haven't been verified. Is there any way that [253] the witness can strain out Knight's?

Mr. Jelinek: They are all identified.

Judge Godbold: Any way you could get Knight here?

Kathleen Veit—for Plaintiffs—Direct

Mr. Jelinek: We had a problem reaching him because he is with his family somewhere in South Carolina.

Judge Godbold: Any way to adjust her calculations from Knight's?

Mr. Jelinek: Yes.

Judge Godbold: How long will that take?

Mr. Jelinek: That means pulling out each one that has his name on it.

Judge Godbold: Mr. Jelinek, the court's position is, and we so rule, we will allow you to proceed with this interrogation and to put all of these survey questionnaires into evidence, and to allow Miss Veit to testify to her calculations concerning all the surveys; this to be subject to your filing with the court within, let us say, 21 days, that would be sufficient time, the deposition of Knight establishing his capacity and competency and accuracy in taking this survey in the same manner that was testified to by the other surveyors yesterday.

[254] Mr. Jelinek: Thank you, Your Honor.

Judge Godbold: If that is done, they will all go in; if that is not done, then Knight's questionnaires will have to be withdrawn and Miss Veit's testimony based on all the questionnaires will have to be withdrawn.

Mr. Jelinek: Thank you, Your Honor.

Q. Would you tell us your compilations for the groups of 1 and 1-A, which consist of the males in Greene County over the age of 21 who can read English, have not been convicted of crimes, and are not registered to vote? A. There were 403 in that group.

Kathleen Veit—for Plaintiffs—Direct

Mr. Boggs: I can't hear.

A. I can't hear.

Judge Godbold: Are the figures this witness is going to testify to reduced to any sort of tabular form.

Mr. Jelinek: Well, there are only six figures, Your Honor, in the entire thing.

Judge Godbold: All right, go ahead.

Judge Grooms: 403?

A. That is Group 1 and 1-A, yes, sir.

Mr. Jelinek: All right.

[255] Judge Grooms: Are these all Negro males?

A. Yes.

Q. All Negro males in Greene County who can read English, have not been convicted of any crime, and who are registered to vote?

Now, how many of them are 1-A? A. 1-A, I have that in my purse.

Judge Allgood: I can't hear

A. 37.

Q. Of this figure, 37 of the 403 are not registered to vote? The real figures are 366 males can read English, not been convicted of any crime, and are registered to vote; 37 can read English, have not been convicted of any crime, and are not registered to vote? A. Excuse me; I believe those are wrong.

Judge Godbold: Miss Veit, we can't hear you over here.

Colloquy

Mr. Jelinek: Would Your Honor give us a moment, please.

Judge Godbold: Yes.

(Witness leaves witness stand.)

Mr. Sikes: If the Court please, the only reason [256] I am here has been disposed of. Would your Honor give me permission to leave?

Judge Godbold: Yes, sir.

Mr. Jelinek: Now, Your Honor, we will have to make it as a group. There are 403 total names of those who read English and have no criminal convictions.

Judge Godbold: And has Miss Veit already testified to this figure?

Mr. Jelinek: Yes, Your Honor, that is the main figure of this 403, some of them are not registered to vote.

Those names are indicated, we haven't computed it; we will give the court this in 30 minutes; am I doing this too confusing?

Judge Godbold: We don't understand what you are doing now.

Mr. Jelinek: We have two groups, one can read English, is registered to vote, and has no criminal conviction. The second group is exactly the same, except they are not registered to vote.

Judge Godbold: Now, do you want to call another witness and call Miss Veit back to the stand later?

Mr. Jelinek: All right; why don't we do that.

[257] Judge Godbold: And it would help us if we don't get into this situation now so that when

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you put the witness on the stand you know she is ready to testify.

Mr. Jelinek: Yes, sir, excuse me.

Paul Bokulich.

PAUL M. BOKULICH, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jelinek:

Q. You are the plaintiff in this case? A. Yes, I am.

Q. Paul M. Bokulich? A. Yes.

Q. Now, you were arrested in Greene County on what date? A. On or about June 20, 1966.

Q. And what was the charge? A. Two Counts of Grand Larceny.

Q. Would you tell the court what political civil rights activity this arrest immediately followed?

Mr. Bradley: We object to that, if the Court [258] please.

Judge Godbold: It is overruled.

Q. Will you answer the question? A. There was a primary election in which Negroes ran for the first time since the Reconstruction in Greene County for position of Tax Assessor, Rev. McShan, Rev. Gilmore for Sheriff; there was one in the primary, and consequently in a run-off position for the Board of Education, a position for Tax Collector was lost in the Primary Run-Off, and a suit was consequently filed in the Federal Court, in this court, for fraud, excessive white votes in the May 3rd Primary Election. This followed a year and a half of intensive civil rights activity throughout the activity; I was project di-

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rector for the Southern Christian Leadership Conference during the political education—for the political education that preceded the election.

Q. Now, what was the date of the run-off primary? A. May 31, 1966.

Q. And what is the date you were accused of committing the crime? A. June 1, 1966.

[259] Q. Was that the next day? A. That was the next day, as I recall those dates. I think that also if I may state that the suit was filed on May 29th.

Q. Now, is this correct, the suit was filed May 29th, the run-off primary was May 31st, and the crime allegedly committed on June 1st? A. As I recall the dates.

Q. Now— A. Two crimes, incidentally.

Q. Two Counts, right? A. Yes.

Q. Was one of the Negro candidates successful? A. Yes, sir; the candidate for Board of Education was successful as also was one I failed to mention for the Greene County Democratic Executive Committee; two motions are still pending.

Q. On what dates did they win? A. On May 31st—excuse me, the Democratic Committee position, the Democratic Committee position was won on May 3rd, and Board of Education post was run by Peter J. Kircey on May 31.

Q. Mr. Kircey was successfully elected on or before [260] the day you were charged with the crime? A. Yes.

Q. Have you also worked on the cotton program in Greene County?

Mr. Boggs: Object to the leading character of the question, Your Honor.

Judge Godbold: Rephrase it.

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Q. Are you familiar with the Agricultural Stabilization Conservation Service? A. Yes.

Q. Have you been invited to testify before any Federal Agency on this? A. I was invited to testify Saturday, May 27th, at the U. S. Civil Rights Commission Hearing in Selma, Alabama.

Judge Godbold: Is that '66 or '67?

A. '67.

Q. On what topic? A. On discrimination in ASCS and its policies and applications and the manner in which it affects the economic status of the Negro.

Q. Is that in reference to Greene County? A. Right; rather especially in Greene County, [261] yes.

Q. Now, did you hear Mr. Banks testify yesterday about judging the migration from ASCS lists? A. Yes.

Q. If the court will bear with us just a few moments, would you very briefly explain the significance of ASCS, why is there such a list?

Judge Godbold: Let me ask you this, might somewhat shorten it for everybody.

Do the plaintiffs dispute that there has been a substantial migration from Greene County? I am not concerned about differences in percentage points, but does the plaintiff dispute there has been a substantial migration of Negro citizens from Greene County to elsewhere?

Mr. Jelinek: Yes.

Judge Godbold: Let's proceed.

Mr. Jelinek: Might I say—

Judge Godbold: I thought that in his '64 decision, that Judge Grooms made a specific finding that there had been such migration.

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Mr. Jelinek: As I attempted to mention yesterday and as we demonstrate in the list—the conviction [262] list, Judge Grooms rendered the appropriate decision based on unrefuted testimony that was offered in '64, that is almost identical to what is offered in this case this year.

We will now be able to demonstrate the 96% that went into—

Judge Godbold: I am not talking about conviction list, I am talking about migration.

Mr. Jelinek: That is the same court, Your Honor; they were unrefuted in 1964, that is why they properly went to Judge Grooms' opinion; we can refute both, that is why Judge Grooms' opinion was based on the same testimony and we are attempting to refute that now, Your Honor.

I don't think the finding in '64 is indicative of the present state of the migration.

Judge Godbold: All right, go ahead.

Q. Thank you, Your Honor.

On the ASCS, what is the purpose of having names on that list? A. These are eligible voters for determining who is to run the ASCS program within the county.

Q. And what is the significance of who runs the [263] ASCS? What is the group called that runs the ASCS?

A. The main governing body with the powers is the County ASCS Commission—Committee.

Q. And are they elected by the people on this list? A. They were—they are elected indirectly because there is an intermediate stage where they—

Q. But eventually elect the people on this list? A. Right.

Q. To go on this list what do you have to be? A. Have

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to be either a farm operator or a farm owner or a tenant farmer.

Q. Now, is a day laborer included? A. No, he is not.

Q. Now, are there substantial male day laborers over 21 in Greene County, Negroes? A. Yes, sir, more and more.

Q. None of these can be on the ASCS list, because they are not permitted to vote? A. That is correct.

Q. What about sons, males who are over 21 whose father works a piece of land and who they assist, can they be on this list? [264] A. Not unless they have their own independent farm operation.

Q. If they are assisting their fathers and can read English and are male over 21, can they be on this list? A. No.

Q. What about wives in the same category? A. Only if their name is jointly on the title to the property.

Q. What about assisting their husbands, would their names be on the list? A. That is what I was answering.

Q. But, I mean, if they don't own property, just assisting? A. They would not be eligible.

Q. Does this include a substantial number of Negroes in Greene County? A. The wives substantially reflect that Negroes are often not familiar with the advantages of having both parties of the marriage on the title to a property, and whites, however, are represented in that number.

Q. Now, how about Negro males over 21 who are supposed [265] to be on the list and do fit the requirements, but are not, have you had any experience in that line? A. Yes; I am often referred to Negroes who do not receive a ballot from ASCS.

Q. And is—why do they not receive a ballot? A. Because they are not on the list.

Q. Has this been the subject of countless Congressional investigations? A. Yes.

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Q. Is there a publication throughout the United States by the United States Civil Rights Division on this?

Mr. Boggs: I object to the form.

The Court: I don't think it is doing anybody any harm, just speeding things along.

Q. Is there a publication, U. S. Civil Rights Commission that deals with this? A. Yes; they have an extensive study of it, I believe, published in 1964.

Mr. Jelinek: May we delay submitting a copy of this to the court?

Judge Godbold: I don't know the materiality of it at this point, Mr. Jelinek; does it have anything [266] to do with Greene County, Alabama?

Mr. Jelinek: It does; as a matter of fact, it deals with Greene County and other counties where Negroes are eligible, have not been placed on ASCS lists.

Judge Godbold: I will let it in as an exhibit within ten days.

Q. Would you give us your estimate of how many Negroes who are eligible to be on the ASCS list are not placed on the ASCS list? A. I would estimate ten percent.

Mr. Jelinek: No further questions.

Judge Godbold: Cross.

Cross Examination by Mr. Boggs:

Q. Mr. Bokulich? A. Yes.

Q. You stated that you were arrested the day after some

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of these activities on two charges of Grand Larceny? A. No, I wasn't arrested; the charge was for Grand Larceny that purportedly occurred on the day after the primary election, and I was arrested on or about June 20th, which would be three weeks later.

[267] Q. And the charge was Grand Larceny against the two separate individuals, and both of them were Negroes, were they not? A. Yes, they were Negroes.

Q. And they identified you in court and had a hearing?

A. One identified me, Mr. Boggs.

Judge Godbold: You are not going to try to try the Grand Larceny charge here, the testimony of any possible relation between his activities and in the charges pertinent—

The Witness: Your Honor—

Judge Godbold: Just a minute, Mr. Bokulich. As to whether it relates to—whether his Constitutional rights are being infringed by an illegally constituted jury as to an offense that may or may not relate to civil rights activity, but the substantive nature of the offense, we are not going to try out here. Without going into the substantive nature of the charge and whether anybody identified him and that sort of thing, we would like to know the procedural history.

Has he been bound over to the Grand Jury, and has he had a preliminary hearing and so forth. Would **[268]** you inquire into that, but we are not interested in whether he is guilty or not guilty.

Mr. Boggs: Yes, sir.

Q. All right.

You had a hearing, did you not, in the court in Greene County on both matters, did you not? A. I had a habeas

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corpus hearing that was ordered by the Supreme Court of Alabama when I was refused bond and the Justice of the Peace refused to hold a habeas corpus hearing without receiving an order from the State Supreme Court of Alabama.

Q. Were you bound over by the Circuit Court and bond fixed, and did you make bond? A. I posted a \$2,000.00 property bond from local property.

Q. And you were bound over to await the action of the Greene County Grand Jury on this matter, were you not? A. Yes.

Q. And you made bond and have been out on bond since that time; is that right? A. Yes.

Q. And you took no appeal from—on that habeas [269] corpus hearing, did you? A. I was out of jail.

Q. You were out of jail? A. Yes.

Q. I know, but you took no appeal on that particular hearing, did you?

Mr. Jelinek: I object, Your Honor. He was out of jail, as he said; he couldn't appeal.

Mr. Boggs: But he was bound over.

Q. You have not been tried on either of these charges in the Circuit Court of Greene County, Alabama, have you? A. No, sir.

Q. Now, you say that you are employed, and that you are active with the SCLC? A. Yes, sir, Southern Christian Leadership Conference.

Q. Is that your employer? A. No, sir; no longer employed by them.

Q. Who is your employer at the present time? A. I

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work now in association with the Southern Rural Action Project.

Q. What? [270] A. Southern Rural Action Project.

Q. Where is your home? A. My home is in Eutaw, Greene County, Alabama.

Q. How long have you lived there? A. I have lived in Greene County for seventeen months.

Q. For seventeen months; prior to that time, where was your home? A. Detroit—well, prior to that time I worked with the Southern Christian Leadership Conference in different locations of Georgia, well, mainly Georgia and prior to that, my home was in Detroit, Michigan.

Q. And you say you have been in Greene County only seventeen months? A. I have been in Greene County for the full seventeen months.

Q. Prior to that time, you ever been in Greene County, Alabama, before? A. No, I haven't.

Q. And where was your home, where were you born? A. I was born in Detroit, Michigan. I was raised just outside of Detroit, Michigan.

Q. All right.

[271] Where did you go to school? A. I attended several places; but most recently I attended Wayne State University; I also attended Sacred Heart Seminary in Detroit; I also attended St. Andrews High School and the Jude Trade School in Detroit, and one year in Beacon Trade School.

Q. What degrees do you hold? A. I hold no college degrees.

Q. Did you attend college any length of time, or just— A. Yes; I attended for about five years in Liberal Arts and Engineering and Business and Philosophy.

Q. You say you reside in Eutaw, Alabama, at the present time.

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What are your activities now? A. I work in community organizing.

Q. For instance? A. For instance?

Q. Uh-huh. A. Developing—presently helping to develop a Farm Co-Operative. Helping to develop a housing project in Eutaw, Alabama; handling general complaints against agencies that the Negro people have to deal [272] with in the Black Belt Counties, mainly Greene County and pre-school for some—for children from three to five years old; there will be more voter education activity, I presume.

Q. What is your age, Mr. Bokulich? A. 29.

Q. What is your race? A. White.

Mr. Boggs: That's all.

Judge Godbold: Anything further, Mr. Jelinek?

Mr. Jelinek: No, sir.

Judge Godbold: Step down.

Mr. Jelinek: Miss Veit, resume the stand.

KATHLEEN VEIT, thereupon resumed the stand and testified further as follows:

Direct Examination Resumed by Mr. Jelinek:

Q. Miss Veit, would you give us now the compilations that we referred to as Group 1, that group of males in Greene County over the age of 21 years, who can read English, have not been convicted of any crimes, and are not registered to vote? A. 333.

[273] Q. Can you give us the listing of those males in Greene County over the age of 21 that we call Group 1-A that can read English?

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Judge Godbold: Let me stop you, Mr. Jelinek. This listing comes from the survey questionnaires, does it not?

A. It—

Mr. Jelinek: That is correct, Your Honor.

Judge Godbold: They don't purport to be all the people in Greene County.

Mr. Jelinek: Oh, no, Your Honor.

Judge Godbold: You are phrasing your question, the number of people in Greene County, you mean the number of people on the survey?

Mr. Jelinek: That is correct. Let me qualify that completely. This is nothing but a sample.

Judge Godbold: How many survey questionnaires are there?

Mr. Jelinek: Estimated around 2,000.

Judge Godbold: All right; go ahead from there.

Judge Allgood: Are those 2,000 being introduced here.

Mr. Jelinek: Yes, Your Honor.

[274] Judge Godbold: That is what you have got here with you?

Mr. Jelinek: Yes, Your Honor.

Judge Allgood: All right.

Q. Of Group 1-A, we call 1-A males over the age of 21 and reside in Greene County, from the survey, who can read English and have not been convicted of any crime, but are not registered, how many? A. 70.

Q. All right.

From the group we call Group Two, Group Two are those who cannot read English, but own land? A. 37.

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Q. Now, do you have a listing of the balance? A. You mean the total?

Q. Yes. A. The total would be 440.

Q. Of what we have given the court? A. Yes.

Q. Now, there are additional which we are not able to identify, because they are not land owners; they may be leaseholders, but we have no evidence to offer along that line. This is the total male offer.

【275】 Now, I ask you for females, what we call Group 1, over the age of 21 years of age who can read English, not been convicted of any crime, and are registered to vote? A. 146—excuse me, Group 1?

Q. Group 1? A. 655, Group 1.

Q. Group 1-A who can read English, not been convicted of any crime, but are not registered to vote? A. 146.

Q. And the Group who cannot read English, but are land owners? A. 14.

Mr. Jelinek: Now, Your Honor, that is the entire presentation as to the survey. May we request the court that in whatever order might come out of these hearings, that the court request the Jury Commission of Greene County to utilize the list that we provide to them of all of these names for addition onto the list in Greene County, and specify to this court why any one individual should not be put on the Jury Commission.

Judge Grooms: Are these individuals that are 【276】 not in the Jury Box now?

Mr. Jelinek: That is correct, Your Honor; that is correct.

Judge Grooms: Presumably you have got 390 in the box now?

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Mr. Jelinek: 82 were Negroes.

Judge Grooms: Well, '67 Box had 390, according to information here.

Mr. Jelinek: I can't speak for the '67 Box.

Judge Godbold: If he goes to trial, he would be going to trial before the—some present or future constituted Grand Jury, but not one that was constituted in '66.

Mr. Jelinek: That is correct, Your Honor, but the Grand Jury that, of course, was estopped by this court, is the one that we have the information involved—

Judge Godbold: We understand your request.

Mr. Jelinek: Thank you.

Now, I think, Your Honor, one way we can get this information rather quickly would be to determine if they would tell us how many women were added to the list, then we would know how many males were put on. [277] Can we have that information?

Judge Godbold: Not just by asking the other side to give you a statistical data in court, doesn't get us anywhere.

Mr. Jelinek: If the court forgives me, I don't have the figures handy of what the figures were on how many were added to the Jury Roll.

Judge Grooms: 300—I will give you the figure here. 390 Negroes on the present roll according to Mrs. Yarbrough.

Mr. Jelinek: O.K.

I would like to ask Miss Veit—well, I now offer these computations in evidence. These are the computations which are based upon the survey sheets;

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these are the names of the individuals listed in the groups as mentioned.

I would like to offer both groups into evidence subject to the deposition of Mr. Knight.

(Plaintiff's Exhibit 22 received.)

Judge Grooms: You don't know about the 390.

Mr. Jelinek: That's correct.

Judge Grooms: Haven't been able to double-check that?

[278] Mr. Jelinek: I wasn't aware that it happened until yesterday.

Judge Grooms: All right.

Judge Godbold: Ready to proceed.

Q. Now, Miss Veit, pursuant to my request, did you make a compilation of the names of juries on these venire lists listed on the Board referring to these venires from Fall, '66, down, did you make a compilation of repetition of jurors who have served on more than one jury from 1960 to 1966? A. Yes, I did.

Q. Let me ask you in your compilations, would you tell the court how many jury venire lists were unavailable of jury lists, because they were missing from the court file at the time these photostats were offered to us? A. Six or seven.

Q. Which one? A. Fall '65 Grand Jury and Criminal; Fall '63 Grand Jury, Civil; Spring '63 Grand Jury and Civil and all of '61 and '62.

Q. In '62, that means how many venires? A. '62, four.

[279] Q. And '61? A. Four also.

That's eleven venires.

Q. Now, you calculate approximately how many juries

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were missing; in other words, what was the approximate number of juries we would have been able to use in these repetitions, had these not been missing? A. About 415.

Q. Now, with the 415 missing, did you make a listing of what jury each juror has served on—I will withdraw that.

Did you make a list of the repetition of those who have served on more than one jury in these six years? A. Yes.

Mr. Bradley: Your Honor, we object to this line of testimony unless the venires that she is testifying about are in evidence.

A. Yes, they are.

Mr. Bradley: And furthermore, how she arrived at the figures for the venires that are absent; she had no opportunity to examine them, and we would like to know how she arrived at that.

[280] Judge Grooms: Did these include the figures for the absent ones?

A. No.

Mr. Bradley: Well, I understood, Your Honor, the question was they have surveyed some 400 names?

A. No.

Mr. Bradley: That were on the absent venire?

Mr. Jelinek: No. If I might have the opportunity, we surveyed only what we have, and if we had had the additional 415 names, we would have assumed there would be many, many more repetitions, but we are operating without these names.

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We are giving the repetitions of just the venires which we have present and have already offered in court in the testimony of Rev. Gilmore.

Judge Godbold: What is the relevancy of this?

Mr. Jelinek: The relevancy, Your Honor, is that we will show on one hand statistics, but also mainly for your own judgment, that only a manipulation of the jury system could have produced people that are on five successive juries in six years or four successive juries in six years.

Judge Godbold: Now, as I understand the theory [281] of your complaint, it is that the jury is illegally constituted, no charge in your complaint that there is any fraud or misconduct of anyone in the drawing of the jury.

Mr. Jelinek: No, Your Honor; but we have claimed there is a pattern and system of discrimination in the jury system of Greene County, which has led to the jury roll and jury venire.

Now, we are attempting to show not as an allegation of proof in the complaint that there was fraud, but to show the pattern of discrimination that has existed in this county in the picking of the jury roll and venire.

Judge Godbold: I see. All right.

Mr. Jelinek: Thank you, Your Honor.

Q. Now, in response to Mr. Bradley's request, how did you compile this list? A. We had a group of about 14 or 15 people who each had one of the venire list which are listed on the chart. And each person read all the names on his chart one at a time, while the others all looked down their list to see if the names were on it, and then we made up this chart.

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[282] Q. Now, after you made this chart, did you yourself, personally check the accuracy of each "X" mark that you made to indicate whether the person listed is where he is supposed to be listed? A. Yes; we went back in and using this list, read off the list that these people were supposed to be on, and checked that particular list again.

Mr. Bradley: May it please the court, we are going to object to this witness' testifying as to the accuracy of these reports unless she herself counted each one.

Mr. Jelinek: She just testified to that, Your Honor.

Mr. Bradley: I think she would have had to have made the compilation herself and be able to testify; if she is testifying to what somebody else did, I object; I don't think it would be admissible, Your Honor.

Judge Godbold: Under the present testimony, I think it would be necessary to lay more sufficient predicate. Her roll in this is not clear—not quite clear yet.

Q. Very well.

[283] I show you a list with "X" marks indicating what venires certain selected people appeared on.

Now, did you yourself check each "X" mark to see if that person is listed under that venire? A. Yes.

Q. Now, originally in order to get this information, did you utilize the help of other people? A. Yes.

Q. And through the use of help of other people, did you compile this list? A. Yes.

Q. And then, did you collect the list checking each name against the original venire? A. Yes.

Q. Or photostatic copy of the venire? A. Yes.

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Judge Godbold: Objection is overruled.

Mr. Jelinek: I offer this in evidence.

Judge Grooms: Don't you have a summary of that.

Mr. Jelinek: We do, Your Honor.

Judge Grooms: Oh, I see, you are offering the original.

[284] Mr. Jelinek: That's right. I want to keep it together for a moment. I point out this is in the folder we submitted to the court.

Q. Now, did you make a breakdown of how often the figures occurred? A. Yes.

Q. Now, I don't want to take the court's time to go through each year, however, just for the year—the particular venire in question, I point out that we deem each year relevant, because we are claiming a pattern, just not in the one year, but for emphasis, I would like to show the court just the venire that would have been for Mr. Bokulich.

Mr. Boggs: Isn't that a matter of argument, may it please the court?

Judge Godbold: Yes.

Judge Grooms: Hasn't given it to us yet.

This is not summarized in this particular exhibit.

Mr. Jelinek: No.

Judge Godbold: All right, go ahead.

Q. In the Fall, 1966 Grand Jury, Civil Venire, how many names were on the venire list, total names? **[285]** A. 65.

Q. And how many were on the jury roll for that year? A. 471.

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Q. Now, how many names appeared five times? A. One name appeared five times.

Q. How many names appeared four times? A. Eleven.

Judge Godbold: That's since 1960?

A. This is since 1960, yes.

Mr. Jelinek: Would be 471 names missing.

Q. How many names appeared three times? A. 16.

Q. How many names appeared twice? A. 15.

Q. And total number of repetitions? A. Of course, 43.

Q. Now, 43 out of 65 names had appeared more than once in the number so indicated? A. Yes.

Q. Now, I would like to save the court's time, I did refer to it in the deposition, but I am sure the counsel will agree that the way the jury roll system [286] works in Greene County and in this State, the Jury Roll is picked once a year and it is picked for, like a school year, for Fall and Spring; so, in 1960—

Mr. Banks: I object to the use of the word picked.

Mr. Jelinek: Chosen.

Mr. Boggs: Drawn.

Judge Godbold: That's all right, we all know what he is talking about, the evidence is undisputed.

Q. Now, when it is drawn, for instance in August, 1966, then it is drawn for the Fall term of '66 and the Spring term of '67; each term has two venires; therefore, if Your Honors would refer, if you would, to the list that we have in the book, you will notice six lines indicating four venires where we have the information, meaning that a jury can

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only appear once out of these four venires, once every Fall, Spring, like the school year, and we have indicated with thick lines on the venire. The reason that this is significant is that we will now demonstrate the number of jurors that were chosen in consecutive years. Now, in this county, how many of these repeated juries appeared five consecutive years, meaning once every time they could have [287] appeared for five years? A. For whole venire?

Q. For this one? A. One appeared five consecutive years.

Q. How many appeared four successive years? A. Three.

Q. How many appeared three successive years? A. Eleven.

Q. And how many appeared two successive years? A. Fourteen.

Mr. Jelinek: Now, I would like to offer the compilation into evidence.

(Plaintiff's Exhibit 23 received in evidence.)

Judge Godbold: Are those the ones you identified previously, before you began the present line of questioning.

Mr. Jelinek: Plus the compilation like this for each year.

Judge Godbold: But you just asked her about it.

Mr. Jelinek: A sample one.

Judge Godbold: All right.

Mr. Bradley: The defendant objects to the introduction of this testimony. We make a motion to [288] exclude all of the testimony by this witness on the grounds it is completely irrelevant and immaterial to this case and no allegation in this com-

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plaint that there has been any fraud committed by anyone in the drawing of these cards out of the jury box for placement on jury venires in Greene County, no allegation on that in the complaint on that basis, and what he is leading up to is to show there is no way in the world that these names could come up in this way without there being some shenanigans going on. We object to it being introduced and move to exclude this witness' testimony.

Judge Godbold: It is overruled.

Mr. Hall: We except.

Mr. Jelinek: I would like to offer for judicial notice the fact that for the repetition to have occurred as listed in the exhibit just offered into evidence by a random sample would be one time in ten million billion—

Mr. Bradley: We object.

Judge Godbold: We can't take judicial notice of that, nor can we take your testimony; it may be you would have to prove it some way.

[289] Mr. Jelinek: We will prove that by deposition of the statistician, Your Honor.

Judge Godbold: No use going into it here; I wouldn't ever know how to make a calculation.

Mr. Jelinek: I wouldn't either, Your Honor.

Q. Now, did you make a separate list of those on the same venires who have appeared five—this is for the whole six years with these six venires missing, have you made a compilation of those that have appeared five times? A. Yes, I did.

Q. How many appeared five times? A. Five.

Q. In the six years? A. That's right.

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Q. Now, did they appear in five consecutive years? A. Yes. They all appeared in five consecutive years in a six year period.

Q. Now, of those that appeared four times in these six years, how many appeared four times in these six years? A. 25.

Mr. Jelinek: I offer this listing into evidence,
[290] Your Honor.

Mr. Hall: We object.

Mr. Bradley: Same objection.

Judge Godbold: Overrule.

Mr. Boggs: Except.

(Plaintiff's Exhibit 24 received in evidence.)

Mr. Jelinek: Your Honor wouldn't want the calculations on these figures either, I presume?

Judge Godbold: No, sir. Mr. Jelinek, how much more examination do you have of Miss Veit?

Mr. Jelinek: I think this is it.

I think that's all, Your Honor.

Judge Godbold: All right. Court will take a ten minute recess.

Mr. Jelinek: Thank you.

(Whereupon, proceedings were in recess from 10:30 a.m., until 10:40 a.m., following which the following occurred:)

Judge Godbold: May we proceed with the cross examination of Miss Veit, please.

*Kathleen Veit—for Plaintiffs—Cross—Redirect**Cross Examination by Mr. Bradley:*

Q. Miss Veit, going back to the [291] compilations you made based on the questionnaires you and various others took from individuals in Greene County, am I correct that the information was given to you and the others, and you and the others recorded this information, and none of the questionnaires were signed by the individuals whom you interviewed; is that correct? A. Yes.

Q. And all of this information was based on what others told you, and your other examiners? A. That's right.

Q. And all of this information was compiled and gathered by you and others at the direction of Mr. Jelinek; is that right? A. Yes.

Q. Am I correct also in that you did not go to every house in Greene County to elicit this information? A. We went to every home; we did not talk to everyone, because everyone was not at home.

Q. But you went to every house in Greene County? A. Yes.

Q. Are these Negro houses, or every house in the [292] County? A. Negro homes.

Q. Negro homes? A. Yes.

Mr. Bradley: That is all.

Judge Godbold: Anything further, Mr. Jelinek?

Mr. Jelinek: Yes, Your Honor, one brief question I overlooked.

Redirect Examination by Mr. Jelinek:

Q. I show you plaintiff's exhibit 11, and I ask you what the yellow lines represent? A. They represent the roads that we covered; we also added roads on this map which

John Head—for Plaintiffs—Direct

were not on the map when it was made in 1950, which are also drawn in, which we covered also.

Mr. Jelinek: No further questions.

Judge Godbold: You can come down.

(Witness excused.)

Judge Godbold: Anything further, Mr. Jelinek?

Mr. Jelinek: Mr. Head.

JOHN HEAD, being first duly sworn, was examined and testified as follows:

[293] *Direct Examination by Mr. Jelinek:*

Q. State your full name, sir? A. John Head.

Q. Where do you reside, Mr. Head? A. Fourteen miles southwest of Boligee.

Q. What is your occupation? A. Farming.

Q. Now, can you read and write English? A. I can.

Q. Have you ever been convicted of a crime? A. No, sir.

Q. How much education have you had? A. Seventh.

Q. Now, will you tell me something about your position in the community, are you a member of a church? A. I am a member of the church.

Q. What is your position in the church? A. Officer.

Q. Are you a member of the Parent Teachers Association? A. President.

Q. Are you connected with the Sunday School? A. Superintendent.

[294] Q. And is there an association in town? A. Treasurer of the Association.

John Head—for Plaintiffs—Cross

Q. Do you own land in Greene County? A. I do.

Q. Do you pay real estate taxes? A. I do.

Q. You wouldn't know if your name is on the Tax Assessor's list.

Are you an alcoholic? A. No, sir.

Q. Do you have any disabling disease or physical infirmities that would prevent you from serving on a jury?
A. I do not.

Q. Have you ever been convicted of an offense involving moral turpitude? A. No.

Mr. Jelinek: Your Honor, the jury roll demonstrates that this man's name is not on the jury roll.

Mr. Hall: We object to his testifying.

Mr. Jelinek: I am only making a statement as to what is in evidence before this court.

[295] Q. You are a plaintiff in this lawsuit? A. Yes, sir.

Mr. Jelinek: I have no further questions.

Cross Examination by Mr. Boggs:

Q. What is your age? A. 66.

Judge Allgood: What did he say?

Mr. Boggs: 66.

Judge Allgood: That is his age?

A. Yes, sir.

Mr. Boggs: That is all.

John Head—for Plaintiffs—Redirect
Mary C. Yarbrough—for Plaintiffs—Resumed—Direct

Redirect Examination by Mr. Jelinek:

Q. If asked, would you serve on a jury? A. I would be glad to.

Judge Godbold: Come down, Mr. Head.

(Witness excused.)

Mr. Jelinek: I would like to recall Mrs. Yarbrough.

Judge Godbold: Is this going to very long?

Mr. Jelinek: Your Honor, I hope not.

[296] MARY C. YARBROUGH, thereupon resumed the stand and testified further as follows:

Redirect Examination by Mr. Jelinek:

Q. Mrs. Yarbrough, I would like to ask you about this list that was prepared, the new jury roll? A. The new roll.

Q. When was the jury roll was prepared? A. It was prepared in January.

Q. Of 1967? A. Of 1967.

Q. And forgive me if I ask you to repeat something that has been testified to, but what is the number of total names on the jury roll, do you know it? A. The total number on the 1967 roll is 1198.

Q. 1198?

Am I correct that this was a special call, this is not the ordinary call? A. That's right.

Q. All right.

On the list of the new 727 names, do you know how many of them are women? **[297]** A. No, I don't, Mr. Jelinek.

Mary C. Varborough—for Plaintiffs—Resumed—Direct

We haven't made a check on that.

Q. Do you have any compilations that—do you have a list here? A. The jury roll is here. That is the only list I have.

Judge Grooms: You can look by their names and tell whether they are women.

A. You can tell, I would think. However, yesterday you asked me if I knew a Mr. Courtney somebody, and it turned out to be a woman.

Q. Mr. Courtney is Mrs. Courtney, is that right? A. That was stated, I gathered; you asked me if I knew Mr., and I understand that the woman's name is Courtney Porter, or whatever it was.

Q. Of the 720 names, you have made a compilation of names—

Judge Grooms: 727?

Mr. Jelinek: I would say—additional names.

Judge Godbold: You got 727 by subtracting.

Mr. Jelinek: That is correct.

Judge Godbold: Go ahead.

Q. Can you tell me how many are Negro and—[298] A. To the best of my knowledge, Mr. Durette came over and went through the list with me. There were people I didn't know, and people he didn't know, but of the ones that either one or the other of us knew to be Negroes, we marked them, and there were 390 that we were positive about; there are a number of people that neither of us know about.

Q. Now, may I ask where you got the names from, the 390 Negro names? A. The same way I told you yesterday, and I filed them.

Mary C. Yarbrough—for Plaintiffs—Resumed—Direct

Judge Allgood: She testified how she got them.

Mr. Boggs: We object because of repetition.

Mr. Jelinek: No, it is not.

Q. Are these all people who have just moved into the county who you did not find for the last six years, are these all new people who have just moved into Greene County? A. Some of them are.

Q. What people would you say are new people? A. I don't know.

Q. Would it be less than five percent? A. I don't know, Mr. Jelinek; I would rather not [299] guess.

Q. It would be very few, I imagine, wouldn't it?

Mr. Bradley: We object to that, may it please the court.

Mr. Jelinek: I withdraw the question.

It is obvious, Your Honor, we are going to have to go through the new list in order to make any breakdown.

Judge Grooms: You mean with respect to women.

Mr. Jelinek: Women and Negroes.

Judge Allgood: I would only be interested, as far as I am concerned, whether or not there are women on the list, and your testimony is there are?

A. There are.

Mr. Jelinek: For example, if it turns out there are only five or ten percent of the eligible women, we are back where we started from, and that is why we have to have these figures to make new compilations.

Mary C. Yarbrough—for Plaintiffs—Resumed—Direct

A. May I make a statement?

Judge Godbold: Yes.

A. I can assure you that there are numerous people—numerous Negro women on the jury, if that is what you are looking for.

[300] Q. I am sure there are.

Judge Godbold: When you say I have to go through the roll, go through the new list, is that what you mean by that?

Mr. Jelinek: Well, the last time we Xeroxed it, we have here which, by the way, is something we should attend to today if they want the jury roll back, this is the substituted copy of it, but we have Xeroxed the entire roll to be able to tabulate who is Negro and who is white, and given the final figures. If you will notice, a few names have been added, but I think the same job would have to be done in order to present to this court how many males and how many are females, and if in fact, there are 390 names.

Mr. Hall: That would not necessarily follow. My name happens to be Leslie. There are many women whose names are Leslie. There are many women named Leslie. There are many men named Cecil and many women named Cecil.

Judge Godbold: It goes to the accuracy of what he purports to do. The court has given you a great deal of latitude in putting in evidence late and going back and putting together the pieces. The **[301]** existence of this new roll is not a surprise to the plaintiff, because this is something in your original

Mary C. Yarbrough—for Plaintiffs—Resumed—Direct

pleadings, or your brief, where you set out the roll has 390 names, and this is not quite 33 and one-third percent of the names on the jury roll, and this is less than enough to return an indictment percentagewise. This new list is not a surprise.

Mr. Jelinek: Forgive me, but I must differ with Your Honor. I have never referred to the new list, and I was not aware until yesterday it occurred. There can be no reference to it in the papers before Your Honor.

Judge Godbold: Maybe I am mistaken, but I think so.

What procedure would you go through to get the information off this new list that you desire?

Mr. Jelinek: The same procedure as last time, Your Honor, which—while the book is here, I would ask that this afternoon this book be brought to a Xerox in Birmingham to Xerox the new roll. What is that number, do you know?

The Witness: I believe it is 50, but I am not sure.

[302] Mr. Jelinek: It is probably 51, Xerox it and submit a copy to Mrs. Yarbrough and Mr. Durette and ask them to identify the Negroes as they just testified they did, and let us make the check and bring it back to this court.

This is a complete surprise to us; we had no knowledge of it; we had no way of knowing a jury roll had been taken, not having a member of the Jury Board to inform us.

Judge Godbold: We will take a five minute recess, but not go into formal recess.

Mr. Jelinek: Yes, sir.

Mary C. Yarbrough—for Plaintiffs—Resumed—Direct

Judge Godbold: Mr. Jelinek, probably you didn't write the brief, it is signed by Mr. Bronstein, but page ten of the brief points out thirty percent of the Greene County Jury List is composed of Negroes, which is obviously not your 82 figure you have there.

Mr. Jelinek: That figure, Your Honor, was—I did write the brief, but that figure was based on the brief we submitted to the Fifth Circuit when we appeared about the original temporary injunction, and the figure wasn't changed. The thirty percent is based upon the venire which was—

[303] Judge Godbold: There is no use in you and me arguing the point; it doesn't say anything about venire, it says jury rolls are thirty percent Negro.

Mr. Jelinek: Not jury roll, it is the jury venire.

Judge Godbold: That is not what your brief says, and there is no use of you and me arguing the point.

The court has considerable question whether there is surprise, but we do point out we will allow the list to be Xeroxed and we will ask, or the court will direct Mrs. Yarbrough and Mr. Durette to mark it and indicate which are Negroes on the 1967 list, and file it with the court in thirty days.

Mr. Jelinek: May I ask Mrs. Yarbrough a few more questions?

Judge Godbold: Yes.

Q. Has myself or anyone in my office seen the jury roll since we Xeroxed it in your office? A. No.

Q. Has anyone been given it?

Judge Godbold: We have ruled with you, let's go ahead.

Mary C. Yarbrough—for Plaintiffs—Resumed—Direct

[304] Mr. Jelinek: I feel that we must point out that we are acting in good faith. I can show you the brief in which we referred to that. It—the reference, the thirty percent is there, and it was copied over by error; we have no knowledge of this roll.

Judge Godbold: Let's move along.

Mr. Jelinek: May we set a date to get the information back to the court?

Judge Godbold: Thirty days; we will tie together all these loose ends when we get through.

The Witness: May I ask a question, please?

Judge Godbold: Yes, sir.

The Witness: Mr. Durette is at Army camp. I don't know when he will be back; I don't know how long he will have to stay.

Judge Godbold: If thirty days is not long enough, the lawyers can ask us for an extension.

Q. Has a jury venire been produced yet from the jury roll? A. The Spring Court was tried from the venire using the new jury roll.

Q. This is Spring, '67? A. Yes.

[305] Q. And were two venires chosen? A. Yes.

Mr. Jelinek: May we also include the Xerox list of those two venires?

They did not have to make an indication, because we can identify Negro and white from the Jury Roll list.

Judge Godbold: The court will direct that be filed at the time set for the other matter.

Judge Grooms: You may remember.

Mary C. Yarbrough—for Plaintiffs—Resumed—Direct

A. There were 85 on the first list for Grand Jury and Civil Week, I believe, 84 or 85, and approximately 50 or 55 of the criminal week.

Judge Grooms: Do you know how many Negroes were on the two venires.

A. Lots, I don't remember.

Judge Grooms: All right, you will furnish the list.

A. Mr. Boggs might be able to tell you.

Judge Godbold: All right, go ahead.

Any other questions?

Mr. Jelinek: I don't think so, Your Honor.

The plaintiffs rest.

Judge Godbold: Mrs. Yarbrough, you may come down.

[306] (Witness excused.)

Judge Godbold: All right, the Respondents.

Mr. Bradley: Nothing for the Respondents, Your Honor.

Mr. Boggs: The jury roll that was put into evidence, may it please the court, is our only copy in Greene County, and in August, the jury meets again, and if we could get copies of it made, someway where the Jury Commission can operate.

Judge Godbold: Haven't I ruled on this already, that photostats will be substituted. On the '67 list, let it be retained in Birmingham and photostated

Colloquy

today at Mr. Jelinek's expense, and photostat substituted in lieu of the 1967 list.

Is the '67 list, per se, in evidence? I am talking about copies of something that hasn't been put in evidence?

Mr. Jelinek: The whole roll is in evidence.

Judge Godbold: What we are talking about is substituting a photostat?

Mr. Jelinek: Once again I offer as a courtesy to counsel our Xerox.

Judge Allgood: You already have the Xerox?

【307】 Mr. Jelinek: That is '66.

Judge Godbold: The court ruled yesterday the '66 photostat would be substituted for the '66 list unless the Respondents made some objection to the accuracy of them.

If they object to the accuracy of the copies, the original stays here.

Mr. Bradley: We have no objection.

Judge Godbold: '66 list may go back to the custody of the respondents.

If the—we will put the photostats in evidence in lieu of it.

The '67 list will be photostated before the list leaves Birmingham and those photostats substituted.

Mr. Jelinek: With the Court's permission, we would like to retain the Xerox copy of '66 to be used for our comparison, if we may take it from the Court.

Judge Godbold: You may withdraw them on the receipt of the clerk.

Mr. Jelinek: Thank you, Your Honor.

Colloquy

Judge Godbold: Let the record show that early in the proceedings, the Plaintiff offered the 1966 census figures, and there was some objection and the [308] matter was not then ruled on, and those census figures are shown on the chart are admitted into evidence.

The map that is in evidence of Greene County, let the record show there has been no proof that the particular boundaries shown thereon are accurate, there has been no proof one way or the other on it.

Now, let's be sure everybody understands what depositions are to be taken. The deposition of what is his name, Mr. Jelinek?

Mr. Jelinek: John deCani.

Judge Godbold: Do you expect to take his deposition orally or on written interrogatories, and where?

Mr. Jelinek: I would have to ask the court if it would be permissible to have it conducted—I guess it would be written interrogatories in Philadelphia conducted by Professor Amsterdam.

Judge Godbold: The court will expect that counsel for the parties will work out the details of taking the deposition either by written interrogatory or orally, and if there are any problems that cannot be worked out between you, you will have to submit them to the court for decision; we would hope that would not be necessary.

[309] How long will it take to take the deposition of deCani or anybody else who may be involved, Mr. Jelinek?

Mr. Jelinek: Would three weeks be permissible, Your Honor.

Colloquy

Judge Godbold: Is that enough time for you, Mr. Bradley?

Mr. Bradley: It is all right, yes, sir.

Judge Godbold: Then it has got to be transcribed.

This deposition and the others we will talk about in a minute will be filed with the court within thirty days from date. This time limit will take precedence over any other time limit that may have been set during the course of the trial.

Are there depositions to be taken of any other persons? Is there anyone other than the surveyor?

Mr. Jelinek: I believe that is all.

Judge Godbold: The same ruling on that.

Now, the Court, during the progress of the trial, has referred to the time during which various exhibits are going to be allowed to be filed late; I have set various times that this could be done as the trial proceeded. Those may be filed within any time during this thirty day period as the depositions.

[310] Mr. Jelinek: Do I understand that the depositions are to be filed within thirty days?

Judge Godbold: That is correct.

Mr. Jelinek: Counsel would need additional time if they wanted to ask further interrogatories.

Judge Godbold: I mean the depositions are to be completed by interrogatories and cross-interrogatories within thirty days.

Mr. Jelinek: Our figure is three weeks.

Judge Godbold: I am suggesting you work out this timing between yourself, when you serve interrogatories and cross interrogatories.

The court is not going to have anything to do with that. If you and Mr. Bradley or the respondents

Colloquy

can't reasonably agree, bring the problem to the court and we will rule on it, and assess costs according to who is dragging his feet.

There is one other loose end the court wants to deal with.

In dealing with the question of service on the motion to quash the second subpoena on former Governor Wallace, was it your statement in open court you had deposited money within an account with the Marshal's [311] office?

Mr. Jelinek: For this deposition.

Judge Godbold: No, for subpoenas in general.

Mr. Jelinek: No, sir. We did have credit with the Marshal; that was my statement. We paid money for the previous subpoenas and they billed us for whatever additional in the past, including the Kirkland case, they extended credit.

Judge Godbold: For this case, Bokulich versus Greene County, do you state to the court whether you have or have not deposited money with the Marshal for subpoena?

Mr. Jelinek: The Marshal requested money for the original subpoena and we sent a check for whatever the amount was.

Judge Godbold: As I understand it, you now state that there was no deposit for the second subpoena of Governor Wallace, nor do you claim that there was any balance of funds for other subpoenas left in the hands of the Marshal that should have been used for this purpose.

Mr. Jelinek: No.

Judge Godbold: The record is clear; the records of the Marshal show no funds in the hands of the

Colloquy

[312] Marshal to be used for this particular subpoena, and I wanted it clear, because I am sure there was an implication there was some funds on hand.

Mr. Jelinek: Certainly not, Your Honor.

Judge Godbold: The court would be interested in having briefs on the facts of this case, after all the depositions and exhibits are filed.

We have noted also three points of law that perhaps are not adequately covered in the briefs on the law filed to date.

The first one is eliminated because of the plaintiff's statement that they cannot proceed with the theory of a Constitutional violation by the appointment of all white jury Commissioners.

The other two points of law won't be briefed, the points other than these two raised in the briefs, the points we have on the law, as far as we are concerned, are sufficient, except for these two points. None of these have been touched on, really by the briefs filed to date. I give you these notations in writing so we can all know what the court desires on that.

How long do you need to prepare a brief after **[313]** the depositions are filed?

Mainly we are talking about facts. You can brief the questions of law.

Mr. Jelinek: The facts?

Judge Godbold: After everything is in.

Mr. Jelinek: Five days will be sufficient for us.

You mean after the thirty days?

Judge Godbold: Yes.

You will have your brief written in five days?

Mr. Jelinek: Sure, the factual brief.

Colloquy

Judge Godbold: After everything is filed, Plaintiff can have fifteen days in which to file a brief, and the respondents can have fifteen days to file, that gives us sixty days from today that the case will be submitted.

Anything else?

Mr. Jelinek: Your Honor brought to my attention, I don't believe I understood the question. As a matter of fact, the Marshal handed me \$18.00 in cash representing money that had been returned to us that we did not have service on someone on. He returned \$18.00 in cash.

[314] Judge Godbold: That money was delivered to me yesterday morning, returned not by the Marshal, but by the witness.

Mr. Jelinek: I got it in the afternoon.

Judge Godbold: That wasn't on deposit with the Marshal. It was returned to me and handed by me down to the clerk for returning to you.

Mr. Jelinek: That money was here.

Judge Godbold: It was already here in the courthouse. In whose physical possession, I don't know.

If there is nothing else to come before the court, the court will be in adjournment.

End of proceedings.

(Certificate Omitted in Printing)

Deposition of John S. deCani

(Filed August 2, 1967)

(Title Omitted in Printing)

**DEPOSITION UPON WRITTEN INTERROGATORIES OF
DR. JOHN S. deCANI**

PURSUANT to the Notice of Taking Deposition Upon Written Interrogatories served by the Plaintiffs herein, June 29, 1967, under the provisions of Rule 31 of the Federal Rules of Civil Procedure, the deposition of Dr. John S. deCani was taken before Rae DiBlasi, Notary Public, Philadelphia County, Pennsylvania, in Room 101, University of Pennsylvania Law School, 3400 Chestnut Street, Philadelphia, Pennsylvania, beginning at 10:25 o'clock A.M., July 31, 1967.

JOHN S. deCANI having been first duly sworn by Rae DiBlasi, Notary Public, Philadelphia County, Pennsylvania, was called as a witness and examined, and testified as follows in response to the interrogatories directed to him:

Q. State your name and address.

A. Dr. John S. deCani, 114 West Mount Airy Avenue, Philadelphia, Pennsylvania 19119.

Q. Are you what is commonly known as a statistician?

A. Yes.

Q. Would you tell us your background, including any faculty positions, consultant positions, awards, membership in professional societies and publication?

A. I am Associate Professor of Statistics and Operations Research at the University of Pennsylvania. I am a consultant to the United States Navy, Columbia Broadcasting System and various industrial concerns in the Philadelphia area. I have had a Fulbright Award to

Deposition of John S. deCani

Norway and a Lindback Foundation Award for Distinguished Teaching. I am a member of the American Statistical Association, Institute of Mathematical Statistics, Biometric Society, Econometric Society, Institute of Management Science and American Association of University Professors. I have published a book in elementary statistics and many papers in the journals of the societies of which I am a member.

Q. What is the science of statistics and what variety of areas does it cover?

A. Statistics apply probability theory to drawing conclusions from data which vary. It is used in many areas—in physical, biological and social sciences.

(a) Do statistics give positive judgments or are they aid to judgments?

A. Since statistics are based on probability theory, the answers are not certain and, therefore, serve only as a guide to making judgments.

(b) What is the function of a statistician in cases involving charges of racial discrimination and in that connection, what is a random sample?

A. I calculate the probabilities of the racial compositions of the various venires under the assumption that the venires were selected at random from the eligible population. By random I mean that every eligible person has the same probability of getting on the venire.

(c) Discuss the area of margin of error or findings attributable to chance.

A. When we look at venire data we can draw one of two conclusions: either the venire was selected at random

Deposition of John S. deCani

from the eligible population or it was not. In either case, we could be in error. The best we can do is to make the probability of error small. Hence, the probabilities I calculate are such that the probability of incorrectly deciding that the selection was not random is equal to the calculated probability.

(d) What is the relation between low probability and systematic racial exclusion such as on a jury panel?

A. This amplifies my answer to (c). If the probability is low, then either the selection was not random or a very unusual event has occurred. In a sense we pay our money and take our choice.

Q. I ask you to assume the following to be true: that in the following years the following numbers served on venires out of the following possible maximum number on the jury roll:

<i>Year</i>	<i>Venire</i>	<i>Jury Roll</i>
1963	167	377
1964	245	399
1965	163	429
1966	115	471

I ask you to further assume that five names which appeared on the Spring 1963 Criminal Venire also appeared on subsequent venires in 1963, 1964 and 1965 and that two of the five also appeared in 1966.

What is the probability that this result would have occurred if the selection was random? Now would you give the basis for your findings?

Deposition of John S. deCani

I ask you to assume that the following numbers of persons appeared on three or more venires in four jury roll years as follows (repeaters are indicated as those who have appeared on three or more venires):*

<i>List</i>	<i>Repeaters</i>	<i>Total</i>	<i>Jury Roll</i>
Fall 1966 Long	27	65	
Fall 1966 Short	11	50	
	—	—	
Total from roll	38	115	471
	==	==	
Spring 1966 Long	26	62	
Spring 1966 Short	16	51	
Fall 1965 Short	17	50	
	—	—	
Total from roll	59	163	429
	==	==	
Spring 1965 Short	14	50	
Spring 1965 Long	32	75	
Fall 1964 Short	16	50	
Fall 1964 Long	17	70	
	—	—	
Total from roll	79	245	399
	==	==	
Spring 1964 Long	26	65	
Spring 1964 Short	21	50	
Fall 1963 Short	18	52	
	—	—	
Total from roll	65	167	377
	==	==	

* At all times hereinafter "short" refers to the criminal venire and "long" refers to the Grand Jury civil venires.

*Deposition of John S. deCani***A. For 1963:**

The probability that five people who served on the Spring 1963 Criminal Venire would also appear on a venire in the following year is .0165 or roughly seventeen chances out of a thousand.

For 1964:

The probability that the same five people would appear on venires is .0859 or roughly eighty-six chances out of a thousand.

For 1965:

This probability is .00762 or roughly eight chances out of a thousand.

Two of the five also served on venires in 1966. The probability of this is .259 or better than one chance in four. However, the probability that all of these things would occur if the selection were by chance is .00000279 or roughly three chances out of a million. Records show that eighty-nine persons served on three or more venires between the fall of 1963 and the fall of 1966.

Since a person can serve on only one venire during a court year (fall-spring), we can combine the data into court years.

<i>Year</i>	<i>Repeaters</i>	<i>Total</i>	<i>Jury Roll</i>
Fall '63—Spring '64	65	167	377
Fall '64—Spring '65	79	245	399
Fall '65—Spring '66	59	163	429
Fall '66	38	115	471

For each year I have calculated the probability of as many "repeaters" as served or more if the selection were by random draw. In 1963 sixty-five repeaters appeared in a

Deposition of John S. deCani

list of 167 veniremen drawn from a jury roll of 377 names. The probability of getting sixty-five or more repeaters if the selection were by random draw is a number which is best written as 3.596×10^{-10} . This is the same as the probability of tossing thirty-two or more consecutive heads with a fair coin. In 1963 there were seventy-nine repeaters out of 245 veniremen drawn from a jury roll of 399 names. The probability of getting seventy-nine or more repeaters by random draw is written as 1.623×10^{-10} . This is the same as the probability of tossing thirty-three or more consecutive heads with a fair coin. Similar calculations from the data given for 1965 and 1966 give probabilities of 1.002×10^{-9} and 1.504×10^{-5} respectively. These probabilities are the same as that of tossing thirty or more consecutive heads with a fair coin and sixteen or more consecutive heads with a fair coin. For all four years combined, the probability of getting the indicated number of repeaters or more by random selection is 8.915×10^{-34} . This is the same as the probability of tossing 110 or more consecutive heads with a fair coin.

The methods used to calculate these probabilities are standard methods and I believe that any competent statistician faced with the same data would draw essentially the same conclusions.

/s/ JOHN S. deCANI
John S. deCani

Witness:

/s/ ANTHONY G. AMSTERDAM
Anthony G. Amsterdam

(Certificate Omitted in Printing)

[132]

Summary of Evidence*

(Filed August 17, 1967)

(Title Omitted in Printing)

I. 1966

Plaintiff Bokulich's case was to be heard by a Grand Jury chosen from the 1966 Grand Jury-Civil Venire ("Bokulich Venire") which itself was chosen out of the 1966 Jury Roll.

CENSUS

The 1960 Census for Greene County, Alabama—Males Over 21:

<i>White</i>	<i>Non-white</i>	<i>Total</i>
755	2247	3022

or, an eligible Negro male population of 74%.

JURY ROLL

The Jury Rolls for 1966 and previous years indicated as follows:

	<i>White</i>	<i>Non-white</i>	<i>Total</i>	<i>% of Negro Males** on the Jury Roll</i>
1961	337	16	353	5%
1962	348	26	374	7%
1963	349	28	377	7%
1964	***	***	399	
1965	382	47	429	11%
1966	389	82	471	19%

* These figures were prepared without the benefit of a transcript of the trial minutes and represent our best efforts to record our recollection and notes of the testimony and proof offered.

** Women were not added to the juries until 1967.

*** No evidence offered.

Summary of Evidence

Less than 4% of the eligible Negro male population were even permitted the possibility of sitting on Greene County juries for those years and, at its maximum, only 16% of the eligible Negro *and* white population were considered for jury service (contrary to Alabama Law which requires a Jury Roll of *at least* a substantial number of the community). This small sample easily led to the repetition of white males on most juries (discussed *infra*).

VENIRE

The Bokulich Venire was composed as follows:

Fall 1966—Grand Jury & Civil Venire (L)

White	Non-white	Total
45	20	65

indicating that Negroes made up 31% of that Jury or 43% less than the population percentage (See cases in Plaintiff's memorandum, page 15 for comparison).

[133] On that Venire of 65 names, some 43 had appeared before on previous Venires since 1960:

REPETITIONS

- 1 had appeared 5 times since 1960.
- 11 had appeared 4 times since 1960.
- 15 had appeared 3 times since 1960.
- 16 had appeared 2 times since 1960.

43

and of that 43, 29 had appeared consecutively:*

- 1 had appeared 5 consecutive times since 1960.

* Note the Jury Venire is like a school year and one can only appear on one Venire for each Fall-Spring sequence.

Summary of Evidence

3 had appeared 4 consecutive times since 1960.
11 had appeared 3 consecutive times since 1960.
14 had appeared 2 consecutive times since 1960.

—

29

A similar breakdown was provided at trial for each Venire since 1960 (where the records were not missing from the clerks office) and revealed that in those six years:

5 names had appeared 5 times since 1960.
25 names had appeared 4 times since 1960.

The deposition of Dr. deCani, a highly qualified statistician, in aid of this courts judgment, indicated that these occurrences just do not happen in the ordinary course of events.

Plaintiffs also introduced into evidence a "spot" survey conducted in Greene County, Alabama by Miss Kathleen Veit of the Lawyer's Constitutional Defense Committee to obtain names and information of Negroes presumably eligible to serve on Juries. Miss Veit testified as to those who could read English and had no criminal convictions—403 males and 801 females.

Only a handful of the 82 Negro males on the 1966 Jury Roll came from this male list.

THE DEFENSE

Defendants maintained that everything required to obtain names of a substantial number of eligible Negroes had been done (baldly discredited by their own ability to find

* Miss Veit also offered approximately 500 additional names of those who could not read English, but might qualify under Section 21 of the Alabama Code.

Summary of Evidence

an additional 201 Negro male names [an increase of 150%] after this case was filed).

The evidence, on the other hand, disclosed that:

1. The clerk and the three members of the jury commission (one who was seriously ill and another who had not participated) were almost totally unfamiliar with the Negro community and relied instead on eight Negroes and fourteen whites to tell them who was qualified. All admitted using virtually no independent judgment in the selection process. In fact, in 1966 only 37 new Negro names were added to the Jury Roll and all but five came from lists drawn up by non-jury commission members.
2. The clerk admitted that she did not even attempt to prepare the list of all potentially eligible jurors (so that the jury commission could decide actual eligibility) as required by Code of Alabama, Title 30, Section 18. She admitted not using the tax registration lists as required by Section 24 while cross-examination revealed that the telephone books were not properly utilized. *To this day*, the 473 Negroes registered to vote *prior* to the Voting Rights Act of 1965* (therefore deemed by the State of Alabama to have met the literacy and good character requirements of Alabama law) are not all represented on the Jury Roll. This, of course, does not even include the additional approximately 1900 Negro names registered after the Voting Rights Act of 1965.**

* Testified to by Fred Wallace, Esq. of the NAACP Legal Defense Fund, Inc.

** Testified to by James O. Parker, U.S. Civil Service Commission.

Summary of Evidence

In an attempt to mitigate the low number of Negroes on the Juries, defendants attempted to show a high Negro crime rate (and therefore bad character) and a high Negro migration rate.

[134] Crime Rate

Defendants offered evidence of 641 serious crimes committed in the last ten years and calculated that 96% of the crimes were committed by Negroes (this very significant testimony was also given in the earlier case of *Coleman v. Barton*). At plaintiffs request and by this courts order, Attorney Ralph Banks "broke down" the list as to resident-non-residents and Negroes resulting in *actually* 59% of the list containing names of Greene County Negroes having been convicted of the crimes—a percentage lower than the actual population. The breakdown is as follows:

Total list of convictions	641*
First exclusion: Beyond Aug. 1966 (date of Grand Jury)	-48
Second exclusion: Whites	-16
Third exclusion:	
Repeats and Females	101
Fourth exclusion: Non-residents	-98
<hr/>	
Total exclusions	263 or 41%
Negroes convicted of crimes 378 or 59% of list.	

Migration

No one would deny that there has been a migration of Negroes from the South to the North—but it is not uni-

* It should be noted that this total figure of crimes accounts for less than 10% of the TOTAL population of Greene County.

Summary of Evidence

form in each county. It is high in some places and low in others and *no probative evidence* was offered to this court to show that Greene County has had any significant migration.

The defense attempted to show that the Negro population had dropped to 68%. On cross-examination, attorney Banks testified that this was solely based on the Agricultural Stabilization and Conservation Service lists of those found eligible to vote in cotton (A.S.C.S.) elections. On direct-examination, plaintiff Paul Bokulich demonstrated that a large number of Negroes (at least 10%) are excluded from these lists both as a result of fraud and technical exclusion regulations.

II. 1967

After this suit was filed, defendants added additional names to the 1966 Jury Roll (the next roll should not have been made until the summer of 1967)—this time also including women. Also, the Spring 1967 Grand Jury-Civil Venire ("new Bokulich Venire") was selected. We therefore look at the new figures.

CENSUS

The 1960 Census for Greene County, Alabama—Males and Females over 21:

	<i>White</i>	<i>Non-white</i>	<i>Total</i>
Male	775	2247	3022
Female	874	2754	3628
	<hr/>	<hr/>	<hr/>
Total	1649	5001	6650

or, an eligible Negro total population of over 75%.

*Summary of Evidence***JURY ROLL***The Jury Roll for 1967:*

	<i>White</i>	<i>Non-white</i>	<i>Total</i>
Male		201	
Female		187	
	<hr/>	<hr/>	<hr/>
Total	810	388	1198

indicating that Negroes now make up 31% of the Jury Roll or 49% less than the population percentage.

Furthermore, less than 8% of the eligible Negro total population even had an opportunity to sit on this years juries (only 7% of the 2247 of the Negro males over 21 and only 9% of the 2754 Negro females over 21.). Only 18% of the eligible Negro *and* white population had this opportunity.

【135】 The “new Bokulich Venire” is composed as follows:

JURY VENIRE*Fall 1967—Grand Jury & Civil Venire (L)*

<i>White</i>	<i>Non-white</i>	<i>Total</i>
55	25	80

indicating that Negroes make up 31% of this jury—the identical percentage of Negroes on the previous Bokulich Venire with the same discrepancy of 43%, and the identical percentage of Negroes on this years Jury Roll. Even more significant is the fact of the number of continuous repetitions. The court can take notice that the probability of the continuation for an additional year

Summary of Evidence

would be even greater than the figures of Dr. deCani.
Of the new Bokulich Venire of 80 names:*

REPETITIONS

- 1 name appeared 6 times since 1960.
- 2 names appeared 5 times since 1960.
- 6 names appeared 4 times since 1960.
- 12 names appeared 3 times since 1960.

—

21

and consecutively:

- 1 name appeared 5 consecutive times since 1960.
- 3 names appeared 4 consecutive times since 1960.
- 10 names appeared 3 consecutive times since 1960.

This writer is admittedly at a loss to explain how 10 out of 80 names on the "new Bokulich Venire" were on the Fall 1966 civil jury Venire since these names should have been removed from the Jury Box until the Fall of 1967. If the reason be that the Fall 1966 civil jury venire did not sit (in voluntary compliance to the injunction in this case) and were placed back in the Jury Box, one can only wonder at the probability that 10 out of 80 of *this* venire (20% of the Fall 1966 civil jury venire) were chosen out of 1198 names in the Jury Box. One may assume that the probabilities are rather slim.

Finally, the 1200 names of those on the "spot" survey list were barely utilized to make up the new list. In fact, only 34 of the male list out of 403 and 43 of the female list of 801 names were used.

* See attached Repetition sheet.

Summary of Evidence

Conclusion

One can easily assume that, at best, the method of selection of juries is not up to a level required by the U.S. Constitution.

Respectfully submitted,

August 15, 1967

/s/ DONALD A. JELINEK
Donald A. Jelinek

S601 S632 F632 S642 S641 F641 F642 S651 S652 F652 S661 S662 F662 S671 S672 F672 S681 S682 F682 S691 S692 F692 S701 S702 F702 S711 S712 F712 S721 S722 F722 S731 S732 F732 S741 S742 F742 S751 S752 F752 S761 S762 F762 S771 S772 F772 S781 S782 F782 S791 S792 F792 S801 S802 F802 S811 S812 F812 S821 S822 F822 S831 S832 F832 S841 S842 F842 S851 S852 F852 S861 S862 F862 S871 S872 F872 S881 S882 F882 S891 S892 F892 S901 S902 F902 S911 S912 F912 S921 S922 F922 S931 S932 F932 S941 S942 F942 S951 S952 F952 S961 S962 F962 S971 S972 F972 S981 S982 F982 S991 S992 F992

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S601 S63a F63a S64a S641 F641 F64a S631 S63a F63a S661 S66a F661 F66a S671 S67a

[137]**Defendants' Memorandum of Facts**

(Filed September 5, 1967)

(Title Omitted in Printing)

On June 10, 1964, the U. S. District Court for the Northern District of Alabama entered a judgment in a case brought by Negro citizens of Greene County, Alabama against the Jury Commission of that county claiming systematic exclusion of Negroes from the jury roll and asking for declaratory and injunctive relief.

The District Court granted a declaratory judgment but denied injunctive relief.

In the declaration, the Court, among other statements, said the Clerk of the Jury Commission was under a duty to visit each precinct in the county once a year to obtain the names of qualified persons to be placed on the jury roll. The Court further stated that persons whose names were to be placed on the jury roll were to be selected without regard to their race.

The Court also said that token representation on the roll or proportional representation would be prohibited.

[138] In an effort to comply with that Court order, the evidence will show that the Clerk of the Jury Commission of Green County, Alabama has visited each precinct in the county at least once each year to obtain the names of qualified persons to be placed on the jury roll; she has used the voter registration rolls—this would include the Federal voting examiner's list of eligibles submitted to the Probate Judge; the telephone directory; and personal knowledge to obtain names of persons for inclusion on jury roll. Tp. 90.

The Clerk of the Commission also testified that responsible and well-known Negroes in the county were asked

Defendants' Memorandum of Facts

to submit names of eligible persons to the Jury Commission. Tpp. 110, 115, 128.

The Clerk also testified that White persons were contacted to furnish names of eligibles to the Jury Commission.

The Clerk testified that about 34 people—19 Negro, 15 White—were contacted to supply the names of eligibles for the jury list in the first part of 1967 when the last jury roll was prepared. Tpp. 157, 158.

The Clerk of the Commission further testified that the present jury roll has 1198 names on it and approximately 390 of these are Negroes. Tp. 160.

She also testified that of the eighteen Grand Jurors that would have heard Bokulich's case in 1966, 10 were White and eight were Negro. Tp. 161. As the Court knows, it takes 12 affirmative votes to indict.

[139] There was testimony by the Clerk that the members of the Commission also solicited names of eligibles from different people in the county, both White and Black, and brought the names of those submitted to the meeting of the Commission that prepared the last jury roll. Tp. 163.

The Clerk testified—she is also Clerk of the Circuit Court of Greene County, Alabama—that of the convictions for felonies 96.99% are for Negro citizens of Greene County, Alabama.

The Clerk also stated that a large number of persons on the voter registration list the last time were over the age of 65. Tp. 167. This would make these persons ineligible for jury duty.

There was testimony by Mr. Ralph Banks, County Solicitor of Greene County, Alabama, that he participated in the taking of the 1950 and 1960 censuses in Greene County, and was thoroughly familiar with the names on

Defendants' Memorandum of Facts

those lists. He further stated that the ratio of Negroes to Whites in 1960 in Greene County was about 82% Negro. But in 1965, due to the migration of Negroes out of the county, that percentage figure had dropped to 62%-65% Negro. Tp. 222.

Mr. Banks stated the exodus of Negroes from the county, particularly in the age group 21-65 was due to the disappearance of most of the small farmers, and the reduction of sawmills from 32 to 2. There are also two veneer mills in the county. Principal workers in these industries are Negroes. Tpp. 223 & 224.

[140] It is readily apparent from the testimony above that the Jury Commission is making every effort to put all qualified persons on the jury roll for Greene County—as directed by Judge Grooms' order of 1964.

In view of the ratio of Negroes in the county—62%-65%—to Whites, the overwhelmingly large number of Negroes on the felony convictions list, and the exodus from the county of Negroes in the 21-65 year age group, it is submitted that 390 Negroes out of 1198 on the jury roll is not evidence of systematic exclusion of Negroes from the jury roll in Greene County, Alabama.

The plaintiff, McShan, was convicted of petty larceny in the Justice of the Peace Court in Greene County, Alabama, as reflected by the authenticated copy of the judgment entry in said Court, and is, therefore, disqualified from being on the jury roll in Greene County.

The "random samples" or "spot" samples taken by employees of the Lawyers Constitutional Defense Committee and the statistical projection made by the witness, de Cani, based on these samples, are used for the sole purpose of proving fraud on the part of the officials drawing the names from the jury box for use on the venires; and

Defendants' Memorandum of Facts

there is no allegation in the complaint of fraud in the drawing and empaneling of the jury venires. Furthermore, there is no direct evidence of fraud or deceit in the drawing of names from the jury box, and there was no attempt to elicit such testimony from any witness called by either side. Consequently, it is suggested that this evidence be given no probative effect in this case.

[141] The evidence submitted to this Court does not warrant the finding of systematic exclusion of Negroes from the jury roll of Greene County, Alabama.

Respectfully submitted,

/s/ MACDONALD GALLION
MACDONALD GALLION
Attorney General
State of Alabama

/s/ ROBERT P. BRADLEY
ROBERT P. BRADLEY
Assistant Attorney General
State of Alabama

/s/ LESLIE HALL
LESLIE HALL
Assistant Attorney General
State of Alabama
Attorneys for Defendants

(Certificate of Service Omitted in Printing)

[146]

Opinion of the Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
WESTERN DIVISION
Civil Action No. 66-562

PAUL M. BOKULICH, WILLIE CARTER, SR., JOHN HEAD, REV.
PERCY MCSHAN, on their own behalf and on behalf of
all others similarly situated,

Plaintiffs,

and

GEORGE GREENE and HUBERT G. BROWN,

Intervenors-Plaintiffs.

—vs.—

JURY COMMISSION OF GREENE COUNTY, ALABAMA, WALTER
MORROW, ALBERT GRAY, and MELVIN DURRETTE, as mem-
bers of the Jury Commission of Greene County, Ala-
bama, MARY C. YARBROUGH, as Clerk of the Jury Com-
mission of Greene County, Alabama, E. F. HILDRETH,
as Circuit Judge for the 17th Judicial District of Ala-
bama, T. H. BOGGS, as District Attorney for Greene
County, Alabama, RALPH BANKS, JR., as County Attor-
ney for Greene County, Alabama, and LURLEEN B.
WALLACE, as Governor of the State of Alabama,

Defendants.

Opinion of the Court

B e f o r e :

GODBOLD, *Circuit Judge*,
and GROOMS and ALLGOOD, *District Judges*.

GODBOLD, Circuit Judge:

This suit is an attack on the jury system of Greene County, Alabama. The plaintiffs charge that there is systematic exclusion of Negroes from grand and petit juries by reason of purposeful discrimination, in violation of the Constitution of the United States and the [154] Constitution of the State of Alabama. They charge that Tit. 30, §§ 4 and 21 of the Code of Alabama (1958) establishing qualifications for jurors are, on their face and as applied, in violation of the Fourteenth Amendment to the Constitution of the United States. And they claim that the all-white jury commission of Greene County is unconstitutionally constituted.

Both declaratory and injunctive relief are sought. Jurisdiction of this court is invoked under 28 U.S.C.A. § 1343 and 42 U.S.C.A. § 1983. A three-judge court has been convened pursuant to 28 U.S.C.A. § 2281. Notice of the suit has been given to the Attorney General and Governor of Alabama as required by 28 U.S.C.A. § 2284(2).

The court has considered the evidence consisting of oral testimony, testimony by deposition, numerous exhibits, and stipulations of the parties, and pursuant to Fed. R. Civ. P. 52 makes and enters in this opinion the appropriate findings of fact and conclusions of law.

Each plaintiff sues on his own behalf and, pursuant to Fed. R. Civ. P. 23, on behalf of a class of those similarly situated. Plaintiff Paul Bokulich is a white civil rights worker associated with the Southern Christian Leadership Conference. He was arrested in Greene County and charged

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with two counts of grand larceny. His arrest followed soon after a sharply-contested primary election in which Negroes were successful candidates for county office. [148] Plaintiffs Willie Carter, Sr., John Head and Rev. Percy McShan are Negro residents of Greene County who allege that they are qualified under the laws of Alabama to serve as jurors in the Circuit Court of Greene County and desire to serve but never have been summoned for jury service. Plaintiffs-intervenors George Greene and Hubert G. Brown are Negro civil rights workers for the Student Non-Violent Coordinating Committee. While working in Greene County in connection with the general election to be held in November 1966 they were arrested on charges of grand larceny.

Temporary restraining orders have been granted against presentation to the Greene County grand jury of charges against Bokulich, Greene and Brown.

The defendants are the members and the clerk of the Greene County jury commission, the Circuit Judge and District Attorney of the state judicial circuit in which Greene County is located, the County Attorney, and the then Governor of Alabama.

The claim of systematic exclusion of Negroes from the Greene County jury roll has been in the courts before. *Coleman v. Barton*, No. 63-4, N.D. Ala., June 10, 1964, was a suit against the members and clerk of the jury commission. The district judge granted a declaratory judgment but on grounds of comity declined to grant injunctive relief. Pertinent extracts from the judgment then [149] entered are as follows:

"1. The Jury Commission of Greene County, Alabama, is under a statutory duty of seeing that the names of every

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person possessing the qualifications to serve as jurors, and not exempt by law from jury duty, be placed on the jury roll and in the jury box of said County.

"2. The Clerk of the Jury Commission of Greene County, Alabama, is under a duty to comply with Section 24 of Title 30 of the Code of Alabama, 1940, to visit every precinct in Greene County at least once a year to enable the Jury Commission to properly perform its duties as commissioners as required by law.

"3. The jury commissioners of Greene County, Alabama, are under a duty to familiarize themselves with the qualifications of eligible jurors without regard to race or color.

"4. The jurors be selected and the roll made up and the box filled on the basis of individual qualifications and not as a member of a race.

"5. No person otherwise qualified be excluded from jury service because of his race.

"6. The Commission not pursue a course of conduct in the administration of its office which will operate to discriminate in the selection of jurors on racial grounds.

"7. In making up and establishing the jury roll and in filling the jury box mere symbolic or token representation [150] of Negroes will not meet the constitutional requirements and that numerical or proportional limitations as to race are forbidden.

"8. The jury roll and the jury box as presently constituted be examined for compliance with these standards and the declaration herein made."

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Contemporaneously the same Coleman was making his way through the state courts, and the United States Supreme Court, on a direct appeal from a conviction of murder in Greene County.¹ The conclusion of the United States Supreme Court in its second opinion, 389 U.S. 22, 88 S.Ct. 2, 19 L.Ed. 2d 22, was that Coleman had established a prima facie case of denial of equal protection by systematic exclusion of Negroes from Greene County juries, and the state had not adduced evidence sufficient to rebut the prima facie case.

1. Standing.

Brown and George Greene are Negroes, charges against whom are proposed to be submitted to the grand [151] jury. Their standing to sue is apparent. Bokulich does not lack standing because he is white. *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966); *United States v. Hunt*, 265 F. Supp. 178 (W.D. Tex., 1967); *Allen v. State*, 110 Ga. App. 56, 137 S.E. 2d 711 (1964); *State v. Lowry*, 263 N.C. 536, 139 S.E. 2d 870 (1965).²

¹ *Coleman v. State*, 276 Ala. 513, 164 So. 2d 704 (1963), *rev'd*, 377 U.S. 129, 84 S.Ct. 1152, 12 L.Ed. 2d 190 (1964), remanded after reversal to trial court for hearing on motion for new trial, 276 Ala. 518, 164 So. 2d 708 (per curiam), 280 Ala. 509, 195 So. 2d 800 (affirming trial court's denial of motion for new trial), *rev'd*, 389 U.S. 22, 88 S.Ct. 2, 19 L.Ed. 2d 22 (1967) (per curiam), judgment affirming trial court vacated, conviction annulled and remanded with direction to quash the indictment, Nov. 27, 1967, unpublished order, Ala. Sup. Ct. (2d Div. 487).

² *Murphy v. Holman*, 242 F. Supp. 480 (M.D. Ala. 1965), *Blauvelt v. Holman*, 237 F. Supp. 385 (M.D. Ala. 1964), *Hollis v. Ellis*, 201 F. Supp. 616 (S.D. Tex. 1961), and *Alexander v. State*, 160 Tex. Crim. App. 460, 274 S.W. 2d 81, *cert. denied* 348 U.S. 872, 75 S.Ct. 108, 99 L.Ed. 686 (1954), hold that a white man may not raise the issue of exclusion of Negroes from the

Opinion of the Court

Head was shown to meet standards for jurors established by Alabama law.³ We find that he represents the interests of a class composed of Negro citizens of Greene County qualified under state law for jury service, entitled to be considered for such service, and in such [152] consideration to have applied to them non-discriminatory standards and procedures, and as such he has standing to sue. *Billingsley v. Clayton*, 359 F.2d 13 (5th Cir.), cert. denied 385 U.S. 841, 87 S.Ct. 92, 17 L.Ed. 2d 74 (1966); *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966); *Mitchell v. Johnson*, 250 F. Supp. 117 (M.D. Ala. 1966); *Brown v. Rutter*, 139 F. Supp. 679 (W.D. Ky. 1956).

[153]

2. The selection methods of the jury commission.

There is a jury commission of three members in each county appointed by the governor. The clerk of the Circuit Court may be employed as clerk of the commission, Tit. 30, § 15, and in Greene County was so employed. The commission is charged with the duty of preparing a jury roll containing the name of every citizen living in the county who possesses the prescribed qualifications and who is not exempted by law from serving on juries. Tit.

jury. In none of those cases was there shown to be substantial identity of interest or concern of the complaining party with the group alleged to be excluded. We are concerned with the essential realities of the situation. The case in which the complaining party is of the same racial group as that alleged to be excluded is the clearest instance of potential violation of equal protection, but it does not set the outer limits of equal protection guarantees or of the right to complain of violations thereof. Nor does the "same class" theory limit due process, the requirements of basic fairness of trial and the integrity of the fact finding process. In the exclusion of an identifiable class from jury service equal protection and due process merge. *Labat v. Bennett*, supra; *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71, 81 (5th Cir. 1959).

³ There was no such proof as to McShan and Carter.

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30, §§ 20, 21 and 24. Tit. 30, § 21 prescribes the qualifications and is quoted in the margin.⁴

The statutory scheme for the selection process begins with the names of substantially all persons potentially eligible for jury service and that group then is [154] narrowed to exclude those not eligible. Sec. 18 provides:

The clerk of the jury commission shall, under the direction of the jury commission obtain the name of every citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence and place of business, and shall perform all such other duties required of him by law under the direction of the jury commission.⁵

This section, as well as §§ 20 and 21, was amended by Act No. 285, Acts of Alabama, Special Session 1966, p. 428,

⁴ "Section 21. The jury commission shall place on the jury roll and in the jury box the names of all citizens of the county who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless willing to do so. When any female shall have been summoned for jury duty she shall have the right to appear before the trial Judge, and such Judge, for good cause shown, shall have the judicial discretion to excuse said person from jury duty. The foregoing provision shall apply in either regular or special venire."

⁵ Under § 21 persons over the age of 65 are not required to serve but may do so if willing.

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adopted September 12, 1966, so as to embrace all citizens rather than male citizens only.

The commission is directed to require the clerk to scan the registration lists, the tax assessor's lists, any city directories and telephone directories "and any and every source of information from which he may obtain information, and to visit every precinct at least once each year." Tit. 30, § 24.

Necessarily there are two steps in the selection of jurors for the jury roll. First there must be a selection of persons to be considered, i.e., the persons to whom the commissioners are to apply the statutory qualifications. Then the criteria of the statutes must be applied to those who are up for consideration.^{5a} The end product of the system established by the Alabama legislature is placing on the jury roll the names of all adult persons who are qualified and not exempted. "The jury commission * * * [155] shall make in a well bound book a roll containing the name of every citizen living in the county who possesses the qualifications herein prescribed and who is not exempted by law from serving on juries." Tit. 30, § 20. "The jury commission shall place on the jury roll and in the jury box the names of all citizens of the county who are generally reputed (etc.)." Tit. 30, § 21. "The jury commission is charged with the duty of seeing that the name of every person possessing the qualifications prescribed in this chapter to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury

^{5a} "The sole purpose of these requirements [of the full list directed by § 18, and use of the sources of information directed by § 24 to be considered] is to insure that the jury commissioners will have as complete a list as possible of names, compiled on an objective basis, from which to select qualified jurors." *Mitchell v. Johnson*, 250 F. Supp. 117, 123 (M.D. Ala. 1966).

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box." Tit. 30, § 24. These directions of the statute have been reaffirmed by the Supreme Court of Alabama:

The first step [in obtaining jurors to serve on grand and petit juries] is to get only qualified men on the jury roll. That is those having the qualifications prescribed by law and not exempt. The names of all such men in the county should be placed on the roll and in the jury box each year.

Fikes v. State, 263 Ala. 89, 95, 81 So. 2d 303, 309 (1955), *rev'd on other grounds*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed. 2d 246 (1957), and by the Court of Appeals of Alabama, *Inter-Ocean Casualty Co. v. Banks*, 32 Ala. App. 225, 23 So. 2d 874 (1945). Failure to put on the roll the name of every qualified person may not be the basis for quashing an indictment or venire absent fraud or a denial of constitutional rights, *Fikes v. State, supra*, at 96, 81 So. 2d at [156] 309, but substantial compliance with these legislative safeguards established to protect litigants and to insure a fair trial by an impartial jury is necessary in order to safeguard the administration of justice. *Inter-Ocean Casualty Co. v. Banks, supra*.

The manner in which the system actually works in Greene County is generally as follows. The clerk does not obtain the names of all potentially eligible jurors as provided by § 18, in fact was not aware that the statute directed that this be done and knew of no way in which she could do it. The starting point each year is last year's roll. Everyone thereon is considered to be qualified and remains on the roll unless he dies or moves away (or, presumably, is convicted of a felony). New names are added to the old roll. Almost all of the work of the commission is devoted to securing names of persons suggested for

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consideration as new jurors. The clerk performs some duties directed toward securing such names. This is a part-time task, done without compensation, in spare time available from performance of her duties as clerk of the Circuit Court. She uses voter lists but not the tax assessor's lists. Telephone directories for some of the communities are referred to, city directories not at all since Greene County is largely rural.

The clerk goes into each of the eleven beats or precincts annually, usually one time. Her trips out into [157] the county for this purpose never consume a full day. At various places in the county she talks with persons she knows and secures suggested names. She is acquainted with a good many Negroes, but very few "out in the county." She does not know the reputation of most of the Negroes in the county. Because of her duties as clerk of the Circuit Court the names and reputations of Negroes most familiar to her are those who have been convicted of crime or have been "in trouble." She does not know any Negro ministers, does not seek names from any Negro or white churches or fraternal organizations. She obtains some names from the county's Negro deputy sheriff.

The commission members also secure some names, but on a basis no more regular or formalized than the efforts of the clerk. The commissioners "ask around," each usually in the area of the county where he resides, and secure a few names, chiefly from white persons.⁶ Some of the names are obtained from public officials, substantially all of whom are white.

⁶ The commissioner who concentrates on four precincts in the south of the county could not say that he visited each of those precincts in the year August 1965-August 1966. The commissioner who had been concentrating on the northern precincts had been ill in August 1966, and his participation in affairs of the commission around that time is acknowledged to have been nominal.

Opinion of the Court

One commissioner testified that he asked for names and that if people didn't give him names he could not submit them.⁷ He accepts pay for one day's work each year, stating [158] that he does not have a lot of time to put on jury commission work. The same commissioner considered that Negroes are best able to judge which Negroes are good and outstanding citizens and best qualified for jury service, that the best place to get information about the Negro citizen is from Negroes. He takes the word of those who recommend people, checks no further and sees no need to check further, considering that he is to rely on the judgment of others.^{7a} He makes no inquiry or determination whether persons suggested can read or write, although § 21 excludes persons who cannot read English. Neither commissioners nor clerk have any social contacts with Negroes or belong to any of the same organizations.

Through its yearly meeting in August, 1966, the jury commission met once each year usually for one day, [159] sometimes for two, to prepare a new roll.⁸ New names presented by clerk and commissioners, and some sent in by letter, were considered. The clerk checked them against

⁷ A portion of his testimony was as follows:

Q. And these are the four precincts you provided names for?

A. That I sort of worked around.

Q. Am I also correct you could not find any list that you submitted to the jury commission? A. I couldn't find them when they wouldn't submit them to me.

Q. Pardon? A. They were not submitted; there was no way for me to find them; I asked for them, and that is all I could do; if they don't send them, I can't submit them.

^{7a} The clerk testified that if one recommending another for jury duty did not know the reputation of the person recommended there was no way for her to find it out.

⁸ An annual meeting is required to be held between August 1 and December 20. Tit. 30, § 20.

Opinion of the Court

court records of felony convictions. New names decided upon as acceptable were added to the old roll. The names of those on the old roll who had died or moved away were removed.

At the August, 1966 meeting one commissioner was new and submitted no names, white or Negro, and merely did clerical work at the meeting. Another had been ill and able to seek names little if at all. The third could remember one Negro name that he suggested. This commissioner brought the name, or names, he proposed on a trade bill he had received, and after so using it threw it away. All lists of suggested names were destroyed. As a result of that meeting the number of Negro names on the jury roll increased by 37. (Approximately 39 were added but it is estimated that two were lost by death or removal outside the country.) Approximately 32 of those names came from lists given the clerk or commissioners by others. The testimony is that at the one-day August meeting the entire voter list was scanned. It contained the names of around 2,000 Negroes.

Thus in practice, through the August, 1966 meeting the system operated exactly in reverse from what [160] the state statutes contemplate. It produced a small group of individually selected or recommended names for consideration. Those potentially qualified but whose names were never focused upon were given no consideration. Those who prepared the roll and administered the system were white and with limited means of contact with the Negro community. Though they recognized that the most pertinent information as to which Negroes do, and which do not, meet the statutory qualifications comes from Negroes there was no meaningful procedure by which Negro names were fed into the machinery for consideration or effectual

Opinion of the Court

means of communication by which the knowledge possessed by the Negro community was utilized. In practice most of the work of the commission has been devoted to the function of securing names to be considered. Once a name has come up for consideration it usually has been added to the rolls unless that person has been convicted of a felony. The function of applying the statutory criteria has been carried out only in part, or by accepting as conclusive the judgment of others, and for some criteria not at all.

Testimony that most of the emigration out of the county is by younger and better educated Negroes, tending to leave in the county those older and illiterate, proves little in the overall picture. In late 1966 there were at least an estimated 2,000 Negroes on the voting rolls.⁹ The minimum voting age in Alabama is 21. It [161] cannot be presumed that all of these adults, or anywhere near all, were over age 65, which in any event is a basis for excuse and not exclusion, or were unable to read English and not freeholders. (In any event it appears that the requirement of ability to read English has been the subject of little inquiry.)

The grand jury panel which met and would have considered the charges against Bokulich had it not been enjoined consisted of ten whites and eight Negroes. The racial composition of a single drawn jury panel cannot cure the disparity on the roll or the deficient system by which the roll is set up and maintained.

In January, 1967, after this suit was filed, an extraordinary session of the jury commission was held. Part of its work was to add females to the jury list, as a result of

⁹ Between November 8, 1965 and August 16, 1966 federal voting registrars registered approximately 1800 to 1900 Negroes as voters in Greene County.

Opinion of the Court

the September, 1966, amendments by the Alabama legislature extending jury service to women. The procedure for obtaining names to be added to the list, including the names of Negroes, was the same as that previously employed. There is evidence that more persons, including more Negroes, were asked for suggestions than in the past, but the system remained the same.¹⁰

[162]

3.

We turn to consideration of the statistical results produced by the operation of the system.

1960 CENSUS, GREENE COUNTY,
PERSONS OVER 21 YEARS OF AGE

	White	% White	Negro	% Negro
Male	775	26%	2247	74%
Female	874	24%	2754	76%
Total	1649		5001	

COMPOSITION OF JURY ROLLS,
1961-66 (MALES ONLY)

Year	White males on Jury Rolls	% of 1960 Pop. (white males)	Negro males on Jury Rolls	% of 1960 Pop. (Negro males)
1961	337	43%	16	.7%
1962	348	45%	26	1%

¹⁰ "[T]he mere change in state law, whose previous commands had already been consciously ignored, did not remove the central issue of the pattern and practice of racial discrimination. The change of merely one of the sources or tools of the conduct did not demonstrate a change in the conduct itself." *Pullum v. Greene*, 5 Cir. 1968, 396 F.2d 251, 254 (5th Cir. 1968).

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Year	White males on Jury Rolls	% of 1960 Pop. (white males)	Negro males on Jury Rolls	% of 1960 Pop. (Negro males)
1963	349	45%	28	1%
1964	—		—	
1965	382	49%	47	2%
1966	389	50%	82	4%

The January, 1967 meeting of the jury commission increased the number of whites and Negroes, a substantial part of the increase coming from inclusion of females for the first time. Whites on the roll increased to 810, which [163] was 49% of the 1960 census figure for adult white males and females. Negroes on the roll increased to 388, which was 7½% of the 1960 census figure for adult Negro males and females. There was testimony that by 1967, through migration of Negroes, the population ratio for all Negroes and all whites had decreased to 65%-35%. Assuming that this change was reflected in the numbers of adults as in non-adults, and that the number of adult whites remained approximately constant, then the approximate number of adult Negroes in the county (male and female) had declined from 5001 to 3065, of whom approximately 12½% were on the rolls in 1967 after the January special meeting. Recognizing the assumptions and approximations involved that prevent exact figures, the disparity is nevertheless evident, for at the same time approximately half of the adult whites (male and female) were on the rolls, a continuation of the previous practice of maintaining on the roll approximately half of the eligible white population.

In 1961 the jury roll was 95% white, 5% Negro. Before the extraordinary session of January 1967 it had become

Opinion of the Court

81% white, 19% Negro. After the extraordinary session it was 68% white, 32% Negro. This is to be contrasted with the estimate of population at that time of 65% Negro and 35% white.

[164]

4.

The discriminatory administration of jury selection laws fair on their face achieving a result of exclusion of Negroes from juries has been a violation of the Fourteenth Amendment for almost 100 years. *Neal v. Delaware*, 103 U.S. 370, 26 L.Ed. 567 (1881). Discrimination in the selection of grand juries has been the basis for reversal of state criminal convictions since 1883. *Bush v. Kentucky*, 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354 (1883).

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.

Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84, 86 (1940).

The Constitution does not require representation of a litigant's race on the jury panel which tries his case, *Bush*

Opinion of the Court

v. *Kentucky*, *supra*. It does not demand that the jury roll or venire be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. *Swain v. Alabama*, [165] 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965). It does require that there be no systematic exclusion of Negroes on account of race from participation as jurors in the administration of justice.¹¹

The statistical results produced by the system employed in Greene County, and the testimony of those who administer the system, establish that there is invalid exclusion of Negroes on a racially discriminatory basis. The *modus operandi* of the selection system, as described by those in charge of it, rather than satisfactorily explaining disparities reaffirms what the figures show, that there has been followed "a course of conduct which results in discrimination 'in the selection of jurors on racial grounds.'" ¹² *Davis v. Davis*, 361 F.2d 770 (5th Cir. 1966); *United States ex rel. Seals v. Wiman*, 304 F.2d 53 (5th Cir. 1962); *White v. Crook*, *supra*.

¹¹ Discrimination against Negroes is not the only factor producing imbalances in jury selection which may be unconstitutional. Prior to its recent amendment the provisions of Tit. 30, § 21, quoted *supra*, denying women the right to serve on juries, was held unconstitutional. *White v. Crook*, *supra*. Exclusion of persons of identifiable national origin (Mexican-Americans) has been struck down. *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954). Maryland has held invalid discrimination on religious grounds. *Schowgurow v. State*, 240 Md. 121, 213 A. 2d 475 (1965). Those of low economic status have been kept off the rolls. E.g., *Labat v. Bennett*, *supra*. California has disciplined a prosecuting attorney who assisted the jury commissioner in eliminating defense-prone jurors from the jury rolls. *Noland v. State Bar*, 63 Cal. 2d 298, 405 P. 2d 129 (1965).

¹² *Akins v. Texas*, 325 U.S. 398, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692, 1696 (1945).

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[166] The Constitution casts upon jury commissioners, as judicial administrators, affirmative duties which must be carried out in order to have a constitutionally secure system.

—*Cassell v. Texas, supra*, at 289, 70 S.Ct. at 633, 94 L.Ed. at 848. "When the commissioners were appointed as judicial administrative officials, it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color. They did not do so here, and the result has been racial discrimination. We repeat the recent statement of Chief Justice Stone in *Hill v. Texas*, 316 US 400, 404, 86 L ed 1559, 1562, 62 S Ct 1159:

'Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case, discrimination necessarily results where there are qualified negroes available for jury service.'

—*Avery v. Georgia*, 345 U.S. 559, 561, 73 S.Ct. 891, 892, 97 L.Ed. 1244, 1247 (1953): "The Jury Commissioners, and the other officials responsible for the selection of this panel, were under a constitutional duty to follow a procedure—'a course of conduct'—which would not 'operate to discriminate in the selection of jurors on racial grounds.' *Hill v. Texas*, 316 US 400, 404, 86 L ed 1559, 1562, 62 S Ct. 1159 [167] (1942). If they failed in that duty, then this conviction must be reversed—no matter how strong the evidence of petitioner's guilt."

—*United States ex rel. Seals v. Wiman, supra*, at 65 (5th Cir. 1962): "Those same cases, however, and others, recognize a positive, affirmative duty on the part of the jury commissioners and other state officials"

Conscious or intentional failure of jury commissioners to carry out their duties, or evil motive, or lack of good

Opinion of the Court

faith, is not necessary for a system to be unconstitutional in its operation.

—*Vanleeward v. Rutledge*, 369 F.2d 584, 586 (5th Cir. 1966). "It is not necessary to determine that any of the commissioners, consciously or intentionally, failed to carry out the duties of their office, to conclude that the jury list from which the panel that tried Vanleeward was selected was totally defective."

—*United States ex rel. Seals v. Wiman*, *supra*, at 65. "[I]t is not necessary to go so far as to establish ill will, evil motive, or absence of good faith, but objective results are largely to be relied on in the application of the constitutional test."

The consequences of the discrimination resulting from failure to seek out and become acquainted with the qualifications of Negroes were described in *Smith v. Texas*, *supra*, at 132, 61 S.Ct. at 166, 85 L.Ed. at 87. "Where jury commissioners limit those from whom grand juries are selected [168] to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."

Alabama is among the most enlightened of the states in requiring that broadly inclusive community lists be consulted and that all eligible persons be shown on the rolls.¹³ The purpose of the Alabama system is to insure that the jury roll is a cross-section of the community. *White v.*

¹³ See Note, *The Congress, The Courts and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 Va. L. Rev. 1069, 1079 n. 54 (1966).

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Crook, supra; Mitchell v. Johnson, supra. Compliance with selection procedures set by a state legislature does not necessarily meet constitutional standards. But if a jury selection system as provided by the Alabama statutes is fairly and efficiently administered, without discrimination and in substantial compliance with the state statutes—which the state courts of Alabama already require—the odds are very high that it will produce a constitutional result of a jury fairly representative of the community. Failure to comply with state procedures does not necessarily produce an [169] unconstitutional exclusion. But the fact of, and the extent of, the failure in this case to comply with the procedures and the results contemplated by the Alabama system is strong evidence of unconstitutionality.

The selection procedures are not validated by the fact that traditionally the system always has been that way, or that the clerk and the commissioners are in effect persons who as a public service contribute their time and effort, or that funds are not provided for the commission to operate in the manner directed by the state statutes and required by constitutional standards.

We hold that Negro citizens of Greene County are discriminatorily excluded from consideration for jury service, in violation of the equal protection clause of the Fourteenth Amendment, and that Tit. 30, § 21 has been unconstitutionally applied as to them. We hold also that the discriminatory exclusion of Negroes is, as to the plaintiffs Bokulich, Brown and Greene, a violation of both equal protection and due process.

5.

The attack on racial composition of the commission fails for want of proof. No proof was adduced except that the commission in Greene County now is and for many years

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has been composed entirely of white men appointed by the governor.¹⁴

[170] The statutory criteria in § 21 of good character, honesty, intelligence, integrity, sound judgment and sobriety are attacked as facially unconstitutional for vagueness. Many states join Alabama in some of these requirements and in excluding convicted felons.¹⁵ The Supreme Court has not held criteria such as these void for vagueness in the selection of jurors. And it has recognized the validity of wide discretion in jury commissioners. *Cassell v. Texas, supra*; *Franklin v. South Carolina*, 218 U.S. 161, 30 S.Ct. 640, 54 L.Ed. 980 (1910). We decline to hold § 21 unconstitutional on its face.

Sec. 4, providing, "Any person who appears to the court to be unfit to serve on the jury, may be excused on his own motion, or at the instance of either party," also is alleged to be unconstitutional on its face. No reason, argument or authority is advanced in support of this allegation, and we decline to hold it facially unconstitutional.

The prayer that prosecutors be required not to reject jurors in exercise of peremptory challenges on account of race is denied. *Swain v. Alabama, supra*.

6. Relief

The plaintiff Head and the class which he represents are entitled to an injunction against discriminatory **[171]** exclusion of Negroes from consideration for jury service in Greene County. In *Coleman v. Barton, supra*, in 1964 the single district judge stayed his hand and entered only

¹⁴ Cf. *Clay v. United States*, 5 Cir., — F.2d — [No. 24,991, May 6, 1968].

¹⁵ See Note, *supra* note 13, at 1073-74 n. 25-28.

Opinion of the Court

a declaratory judgment. His abstention from granting injunctive relief was based in part on the fact that the general relief sought of him by Coleman as one of the plaintiffs encompassed the specific relief contemporaneously sought by Coleman in state courts and the state courts should not be interfered with in their determination. In the judgment in that case the judge expressly left the door open for future injunctive relief, i.e., "[R]elief by way of injunction be and the same is hereby denied, but without prejudice as to future injunctive relief by further application herein or in any other proceedings." The declaration of rights and duties then made had not, as of January, 1967 produced a jury roll or a jury selection system meeting constitutional standards or purporting in real substance to carry out the mandate of the Alabama legislature. Coleman's litigation is now at an end. The plaintiffs in this case include Head as representative of the same general class as the plaintiffs other than Coleman in *Coleman v. Barton*. There is no occasion for further withholding of injunctive relief that will run to the benefit of other plaintiffs in *Coleman v. Barton* and in this case, and to which they are entitled.

[172] The normal and most appropriate method for Bokulich, Brown and Green to raise the composition of the jury roll and the operation of the jury selection system is in criminal prosecutions in the state courts, if indictments issue. *Stefanelli v. Minard*, 342 U.S. 117, 123, 72 S.Ct. 118, 121, 96 L.Ed. 138, 144 (1951); *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943). Their requests for injunctive relief will be denied.

Opinion of the Court

The motion of the defendants to dismiss and the objections to the intervention by Brown and George Greene are to be overruled and denied. Dismissal on the merits will be entered as to all defendants other than the members and the clerk of the jury commission.

The attention of the defendants is directed to *Mitchell v. Johnson*, 250 F. Supp. 117 (M.D. Ala. 1966), and to the recently decided case of *Turner v. Fouché et al.*, C.A. No. 1357, S.D. Ga., Aug. 1968. In *Mitchell* the jury commissioners of Macon County, Alabama, were directed to abandon the jury roll, and to compile a new jury roll in strict accordance with the law of Alabama and the applicable constitutional principles. The court pointed out the necessity of the clerk's compiling the master list directed by § 18 and of the commission's employing the sources of information which the Alabama statutes direct be employed, so as to compile on an objective basis a list as complete as [173] possible, and then to apply thereto the subjective standards of § 21—good character, sound judgment, ability to read English, etc.—fairly and objectively to all in a nondiscriminatory manner and without regard to race.

In *Turner* the jury commissioners of Taliaferro County, Georgia, a predominantly rural county comparable to Greene County, were informed by the court that the jury was illegally constituted because of exclusion of Negroes. Without the necessity of further orders of the court the county officials recomposed the jury list and reported to the court the results. The jury commissioners gave separate consideration to the name of every potentially eligible juror. If they lacked information about a particular individual they made inquiry in the community. Inquiries about Negroes were made of Negroes. Responsible Negroes

Opinion of the Court

were called upon to assist, and did assist, the jury commissioners. Specific eliminations were made based on poor health, citizens who were away from the county most of the time, persons requesting that they not be considered, persons about whom no information was available, and persons rejected as not conforming to the statutory standards of being intelligent and upright citizens. A Negro was appointed as clerk to the commission until such time as a Negro or Negroes could be appointed to membership.

Attention also is directed to the personal survey method employed by the jury board of Jefferson County, Alabama. *Billingsley v. Clayton*, 359 F.2d 13 (5th Cir. 1966).

Judgment will be entered in accordance with this opinion.

DONE this the 13 day of September, 1968.

/s/ J. M. GODBOLD
United States Circuit Judge

/s/ H. H. GROOMS
United States District Judge

/s/ C. W. ALLGOOD
United States District Judge

[SEAL]

A TRUE COPY

WILLIAM E. DAVIS, Clerk
United States District Court
Northern District of Alabama

By: /s/ MARGARET M. HOEHN
Deputy Clerk

Judgment

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
WESTERN DIVISION
Civil Action No. 66-562

PAUL M. BOKULICH, WILLIE CARTER, SR., JOHN HEAD, REV.
PERCY McSHAN, on their own behalf and on behalf of
all other similarly situated,

Plaintiffs,

and

GEORGE GREENE and HUBERT G. BROWN,

Intervenors-Plaintiffs,

—vs.—

JURY COMMISSION OF GREENE COUNTY, ALABAMA, WALTER
MORROW, ALBERT GRAY, and MELVIN DURRETTE, as mem-
bers of the Jury Commission of Greene County, Ala-
bama, MARY C. YARBROUGH, as Clerk of the Jury Com-
mission of Greene County, Alabama, E. F. HILDRETH,
as Circuit Judge for the 17th Judicial District of Ala-
bama, T. H. BOGGS, as District Attorney for Greene
County, Alabama, RALPH BANKS, JR., as County Attor-
ney for Greene County, Alabama, and LURLEEN B.
WALLACE, as Governor of the State of Alabama,

Defendants.

Judgment

Pursuant to the opinion filed in this case in lieu of formal findings of fact and conclusions of law under Rule 52, Fed. R. Civ. P.,

It is ORDERED, ADJUDGED, DECLARED and DECREED as follows:

1. There is systematic exclusion of Negroes from the jury rolls of Greene County, Alabama, by reason of purposeful discrimination, in violation of the Fourteenth Amendment [176] to the Constitution of the United States.
2. Tit. 30, § 21, Code of Alabama (1958), as amended, establishing qualifications for jurors, has been unconstitutionally applied to Negroes of Greene County, Alabama.
3. The motion to dismiss by defendants is overruled and denied. The intervention of George Greene and Hubert G. Brown is allowed and the objections thereto are overruled and denied.
4. The prayer of plaintiffs Paul M. Bokulich and plaintiffs-intervenors George Greene and Hubert G. Brown for injunction forbidding the grand jury of Greene County, Alabama, to consider criminal charges against them is denied.
5. The prayer that prosecutors in the Circuit Court of Greene County, Alabama, be enjoined from exercising peremptory challenges against jurors on account of race is denied.
6. The prayer that Tit. 30, § 21, Code of Alabama (1958), as amended, and Tit. 20, § 4, of said code, be declared unconstitutional on their face is denied.

Judgment

7. The prayer that the jury commission of Greene County, Alabama, be declared constituted in an unconstitutional manner is denied.

8. This action is dismissed on the merits as to defendants E. F. Hildreth, as Circuit Judge; Lurleen B. [177] Wallace, as Governor; T. H. Boggs, as District Attorney; and Ralph Banks, Jr., as County Attorney.

9. The defendants Walter Morrow, Albert Gray and Melvin Durrette, as members, and Mary C. Yarbrough, as clerk, of the jury commission of Greene County, Alabama, and their successors in office, are hereby restrained and enjoined from systematically excluding Negroes from the jury roll of Greene County, Alabama, and from applying Tit. 30, § 21, Code of Alabama (1958), as amended, to Negroes in a manner other and different from the manner in which applied to whites. The said defendants are ordered to take prompt action to compile a jury list for Greene County, Alabama, in accordance with the laws of Alabama and the constitutional principles set out in this judgment and in the opinion of the court entered this date. They are ordered to file with this court within sixty days a jury list as so compiled, showing thereon the information required by Tit. 30, § 20, Code of Alabama (1958), as amended, plus the race of each juror, and if available the age of each juror, and a report setting forth the procedures, system and method by which said list was compiled and by which in the compilation thereof the qualifications for jurors, and the exclusion from jury service, provided by the laws of Alabama were applied to adult citizens of the county.

Judgment

10. The costs of this action to date are taxed against the defendants named in paragraph 9.

DONE, this 13 day of September, 1968.

/s/ J. M. GODBOLD
United States Circuit Judge

/s/ H. H. GROOMS
United States District Judge

/s/ C. W. ALLGOOD
United States District Judge

[SEAL]

A TRUE COPY

WILLIAM E. DAVIS, Clerk
United States District Court
Northern District of Alabama

By: /s/ MARGARET M. HOEHN
Deputy Clerk

[181]**Notice of Appeal**

(Filed November 7, 1968)

I

PLEASE TAKE NOTICE that Willie Carter, Sr., John Head and Reverend Percy McShan, on their behalf and on behalf of all others similarly situated hereby appeal to the Supreme Court of the United States from so much of the final order of this court entered in the above-styled action on September 13, 1968, which denied their prayers for a permanent injunction against the enforcement, operation and execution of Alabama Code, Title 30, Sections 4 and 21 on the ground of the unconstitutionality of these statutes on their face and as applied and which denied their prayer for relief with respect to the unconstitutionality of the racial composition of the jury commission.

II

This appeal is taken pursuant to Title 28, U.S.C. § 1253.

III

The clerk will please prepare a certified copy of the record in this action for transmission to the clerk of the Supreme Court of the United States and include in the record, so certified, the following:

[182] (1) The complaint and any amendments thereto, all answers filed by any of the defendants and any amendments thereto, all motions and/or other pleadings filed by any of the plaintiffs or defendants herein.

(2) All notices for the taking of deposition, all depositions filed in the case, all interrogatories filed by any of

Notice of Appeal

the parties and the answers thereto, all requests for admission of facts or genuineness of documents and the answers thereto filed by any of the parties, all motions for production, if any, of documents or other matter filed by any of the parties and any other matters pertaining to discovery.

(3) The complete transcript of the hearing before the three-judge court which commenced on June 6, 1967.

(4) All exhibits of any of the parties introduced either at the hearing or at any other time, all reports to the court, affidavits, etc.

(5) All orders, opinions and judgments of whatever description entered by the court herein.

(6) Any other parties of the record not included in the above.

(7) This notice of appeal.

IV

The following questions are presented by this appeal:

(1) Are Sections 4 and 21 of Title 30 of the Code of Alabama (Recompiled 1958) unconstitutionally vague on their face and as applied in violation of the Fourteenth Amendment to the Constitution of the United States?

[183] (2) Did the district court err in refusing to hold that the Jury Commission of Greene County, Alabama is constituted in violation of the Fourteenth Amendment to the Constitution of the United States because of racial discrimination in the selection of its members?

Notice of Appeal

Dated: October 23, 1968

Respectfully submitted,

/s/ NORMAN C. AMAKER

NORMAN C. AMAKER

JACK GREENBERG

MICHAEL MELTSNER

10 Columbus Circle

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ORZELL BILLINGSLEY, JR.

1630 Fourth Avenue, North

Masonic Temple Building

Birmingham, Alabama 35203

*Attorneys for Plaintiffs and
Plaintiffs-Intervenors*

Certificate of Service

I hereby certify that on this 7th day of November, 1968, a copy of the foregoing Notice of Appeal was served upon Hon. MacDonald Gallion, Attorney General of Alabama, Administrative Building, 64 North Union Street, Montgomery, Alabama 36104, Thomas Boggs, Esq., Circuit Solicitor, 17th Judicial Circuit of Alabama, Linden, Alabama 36748 and Ralph Banks, Jr., Esq., County Attorney, Eutaw, Alabama, via first class mail, postage prepaid.

All parties required to be served have been served.

/s/ NORMAN C. AMAKER

Norman C. Amaker
*Attorney for Plaintiffs and
Plaintiff-Intervenors*

Order Noting Probable Jurisdiction

(Filed March 3, 1969)

(Title Omitted in Printing)

In this case probable jurisdiction is noted. The case is placed on the summary calendar and set for oral argument immediately following No. 842.

**Designation of Portions of Record
to Be Printed in Single Appendix**

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1968
No. 908

WILLIE CARTER, SR., JOHN HEAD, REV. PERCY McSHAN,
Appellants,
v.

JURY COMMISSION OF GREENE COUNTY, ALABAMA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Appellants herewith designate the following portions of
the record on appeal for printing:

1. Amended complaint (pp. 18-27)
2. Order designating three-judge court (p. 31)
3. Answer (pp. 51-52)
4. Deposition of Mary C. Yarbrough
5. Deposition of Albert Gray
6. Transcript of trial
7. Deposition of John S. deCani
8. Summary of Evidence (pp. 132-136)

*Designation of Portions of Record
to Be Printed in Single Appendix*

9. Defendants' Memorandum of Facts (pp. 137-141)
10. Opinion of the court (pp. 146-174)
11. Judgment (pp. 175-178)
12. Notice of Appeal—filed November 7, 1968 (pp. 181-183)
13. Order noting probable jurisdiction—March 3, 1969
14. This designation

Respectfully submitted,

Original signed by:

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*Designation of Portions of Record
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 1969, a copy of appellants' Designation of Portions of Record to be Printed in Single Appendix was served upon Hon. MacDonald Gallion, Attorney General of Alabama, and Robert P. Bradley, Assistant Attorney General of Alabama, Administrative Building, 64 North Union Street, Montgomery, Alabama 36104, via airmail, postage prepaid.

All parties required to be served have been served.

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Supreme Court of the United States

No. 908 ----- , October Term, 19 68

Willie Carter, Sr., et al.,

Appellants,

v.

**Jury Commission of Green County, Alabama,
et al.**

**APPEAL from the United States District Court
for the Northern District of Alabama.**

**The statement of jurisdiction in this case
having been submitted and considered by the Court,
probable jurisdiction is noted. The case is placed
on the summary calendar and set for oral argument
immediately following No. 842.**

March 3, 1969

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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

October Term, 1968

No. ~~300~~ 30

WILLIE CARTER SR., JOHN HEAD, REV. PERCY MCSHAN,
Appellants,

—v.—

JURY COMMISSION OF GREENE COUNTY, ALABAMA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

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IN THE
Supreme Court of the United States

October Term, 1968

No.

WILLIE CARTER SR., JOHN HEAD, REV. PERCY McSHAN,
Appellants,

—v.—

JURY COMMISSION OF GREENE COUNTY, ALABAMA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the United States District Court for the Northern District of Alabama entered September 13, 1968, refusing to declare Alabama Code, Title 30, Sections 4 and 21 unconstitutional on their face because of vagueness and as applied and to enjoin their operation and enforcement, and further refusing to declare the all-white jury commission of Greene County, Alabama unconstitutional. This statement is submitted to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The opinion of the District Court for the Northern District of Alabama is as yet unreported and is set forth in

the Appendix, p. 1a, *infra*. (Hereinafter, references to the Appendix will be designated by A.)

Jurisdiction

This is an action for injunctive and declaratory relief in which the jurisdiction of a District Court of three judges was invoked under 28 U.S.C. §§1331, 1343, 2201, 2202, 2281, 2283 and 2284, and under 42 U.S.C. §1981 to vindicate and enforce rights of the plaintiffs guaranteed by the due process and Equal Protection Clauses of the Fourteenth Amendment alleged to be violated by a statute of the State of Alabama (Title 30, §21) governing the qualifications of jurors and by the practice of selecting only white jury commissioners by the State's Governor pursuant to Title 30, §§9 and 10, Code of Alabama (1958), as amended.

The final judgment of the Court below entered September 13, 1968, *inter alia*, adjudged that there is systematic exclusion of Negroes from jury rolls of Greene County, Alabama, by reason of purposeful discrimination and enjoined the jury commission, its clerk, and agents from such exclusion. However, the Court upheld the constitutionality of the challenged statutory provisions against plaintiffs' prayer that they be declared unconstitutional on their face.

Notice of Appeal on behalf of appellants Carter, Head, McShan, and the class they represent was timely filed on November 7, 1968. A certified copy of the record from the district court was filed in this court on December 16, 1968 and the Clerk has been advised that it will serve as the basis for this appeal and the separate appeal of three other plaintiffs in the district court relating to other issues.¹

¹ That appeal was docketed here on Dec. 11, 1968 as *Bokulich v. Jury Commission of Greene Co.*, No. 1255 Misc. O.T. 1968.

Receipt of the record was acknowledged by the office of the Clerk of the Court December 17, 1968.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1253 to review the judgment of the three-judge district court denying, after notice and hearing, interlocutory and permanent injunctive relief against the enforcement of the statutes of the State of Alabama on the ground that they violate the Federal Constitution. See, e.g., *Idlewild Bon Voyage Liquor Corporation v. Epstein*, 370 U.S. 713 (1962).

Constitutional and Statutory Provisions Involved

The primary statutory provision involved in this litigation is Code of Alabama Tit. 30, Section 21, as amended Sept. 12, 1966 which reads as follows:

"The jury commission shall place on the jury roll and in the jury box the names of all citizens of the County who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty five years shall be registered to serve on a jury or to remain on the panel of jurors unless willing to do so. When any female shall have been summoned for jury duty she shall

have the right to appear before the trial judge, and such judge, for good cause shown shall have the judicial discretion to excuse said person from jury duty. The foregoing provision shall apply in either regular or special venire."

The following additional provisions are material to an understanding of the issues presented: Code of Alabama, Tit. 30, Sections 9, 10, 18, 20, 24 and 30. These enactments are set out in full in the Appendix at pp. 29a-32a, *infra*.

This action also involves the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

1. Whether Code of Alabama, Title 30 §21 is unconstitutionally vague in violation of the Fourteenth Amendment because its requirement that jurors be persons "who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment" provides Alabama jury officials with the opportunity to discriminate on racial and other grounds, an opportunity shown by the record to have been resorted to in this case?

2. Whether Alabama's practice of appointing only white persons to serve as jury commissioners violates the Fourteenth Amendment where the all-white jury commissioners customarily resort to the opportunity to discriminate provided by statute or are so unrepresentative of a cross-section of the community, particularly a community with a majority black population, that they fail to produce jury rolls reflecting that cross-section?

Statement

A. Introduction

This civil action challenging the constitutionality of Alabama's juror selection statute on its face and as applied arises from Greene County, Alabama, the locus of *Coleman v. Alabama*, 377 U.S. 129 (1964) (Coleman I); 389 U.S. 22 (1967) (Coleman II). It was initiated by Paul M. Bokulich, Willie Carter, Sr., John Head, and Rev. Percy McShan. Paul Bokulich was in 1966 when he was arrested and charged with grand larceny, a white civil rights worker associated with the Southern Christian Leadership Conference. Arrested at the same time as Bokulich and also charged with grand larceny were George Greene and Hubert G. Brown, both Negro civil rights workers. Before filing this action, Bokulich obtained an order from the Court of Appeals for the Fifth Circuit enjoining and restraining the prosecution of the criminal action. Since the action involved a claim of the unconstitutionality of statutes of the state of Alabama, it was appropriately tried by a federal district court of three judges. 28 U.S.C. §§2281, 2284. George Greene and Hubert Brown subsequently joined in the civil action as plaintiffs-intervenors.

Appellants Carter, Head and McShan are Negro citizens and residents of Greene County, and joined in this action as plaintiffs on behalf of themselves individually and as representatives of a class consisting of all potentially eligible Negro jurors of Greene County who are excluded from such service because of their race.

As to plaintiff Bokulich, and plaintiffs-intervenors Greene and Brown, the Court below held that the discriminatory exclusion of Negroes from the grand jury constituted a violation of both equal protection and due process (A-20a).

In considering relief to be granted, however, the Court held:

The normal and most appropriate method for Bokulich, Brown and Greene to raise the composition of the jury roll and the operation of the jury selection system is in criminal prosecutions in the state courts, if indictments issue. (A-22a).

The court thus refused to continue in effect the stay of the state criminal prosecutions. They have taken a separate appeal to this court from the district court's refusal to enjoin their state court prosecutions. (*Bokulich, et al. v. Jury Commission of Greene Co., Ala., et al.*, No. 1255 Misc. O.T. 1968.)

With respect to plaintiffs Carter, Head and McShan and the class they represent, the Court below held:

. . . that Negro citizens of Greene County are discriminatorily excluded from consideration for jury service, in violation of the equal protection clause of the Fourteenth Amendment, and Title 30, §21 has been unconstitutionally applied to as them. (A-20a).

They, the Court continued, ". . . are entitled to an injunction against discriminatory exclusion of Negroes from consideration for jury service in Greene County." (A-21a). In the implementation of the holding, defendants were ordered to "take prompt action to compile a jury list for Greene County, Alabama . . . [and] to file with this [District] court within sixty days a jury list as so compiled, showing thereon the information required by Title 30, §20, Code of Alabama (1958), as amended, plus the race of each juror, and if available the age of each juror, and a report setting forth the procedures, system and method by which said list was compiled. . . ." (A-27a).

But the Court refused to declare §21 unconstitutional on its face (A-26a) and refused to declare the county jury commission unconstitutionally constituted (A-27a), and it is from this portion of the order and judgment that this appeal is taken.

B. Selection Process of Jury Commissioners and Jurors

The standards and procedure for selecting jury Commissioners and Jurors are contained in Code of Alabama, Title 30.

Each county has a jury commission comprised of three members appointed by the Governor. The Commission is charged with the duty of preparing a jury roll containing the names of every citizen living in the county who possesses the prescribed qualifications and who is not exempted by law from serving on juries.

The selection process contemplated by the statute operates in two stages. First there is the collection of names of substantially all persons potentially eligible for jury service. The clerk of the Circuit Court may be employed as clerk of the Commission, Title 30, §15, and in Greene County was so employed. Title 30, §18 directs the clerk of the commission to obtain the name of every citizen of the county over twenty-one and under sixty-five. Sources from which such names are to be collected are contained in Title 30, §24, which directs the commission, through its clerk, to scan the registration lists, the tax assessor's lists, any city directories and telephone directories "and any and every source of information from which he may obtain information, and to visit every precinct at least once each year."

The second stage involves application of the statutory qualifications to the general pool of potential jurors so

selected. "The jury commission . . . shall make in a well bound book a roll containing the name of every citizen living in the county who possesses the qualifications herein prescribed and who is not exempted by law from serving on juries." Title 30, §20.

A qualified juror is one who is "generally reputed to be honest and intelligent . . . and esteemed in the community for [his] integrity, good character and sound judgment." Title 30, Section 21.

In Greene County, the clerk of the commission did not obtain the names of all potentially eligible jurors as provided by §18. She testified below that she never prepared a list of all potentially eligible persons between the ages of 21 and 65 (T. 93).^{*} Everyone on the jury roll is considered qualified and remains on the roll unless he dies or moves away (T. 148). New names are added to the old roll. Both the clerk and the jury commissioners secure names of persons suggested for consideration as new jurors.

In securing the new names, the clerk testified that she did not use the tax assessor's list (T. 111), that she did not use all available telephone directories (T. 100), and that she did not know the reputation of most of the Negroes in the county (T. 138). She visits each of the eleven beats in the county annually and talks with persons she knows to secure names (Yarborough, Deposition, p. 13). The names suggested to her and to the commissioners by Negroes in the community are accepted without further investigation to see that they meet the qualifications necessary (T. 136-137).

The commissioners, who exercise their subjective judgment in applying these qualifications, are appointed pursu-

^{*} ("T." references are to the transcript of the trial below).

ant to statute. Title 30, §10 provides that they are to be appointed by the governor. Title 30, §9 requires the commissioners so appointed to "be persons reputed for their fairness, impartiality, integrity and good judgment."

In practice, the Jury Commissioners appointed in Greene County are now and, as far as appellants have been able to ascertain have always been, entirely white (T. 88). They share with the clerk the responsibility for adding new names to the general pool. Their procedures are even less formalized than the clerk's. The commissioners "ask around" for names of possible jurors usually in the area of the county in which they reside (T. 183). At the August 1966 meeting one commissioner was new and submitted no names (T. 143). Another had been ill and unable to seek many names at all (T. 142). The third could remember only one Negro name that he suggested (Gray Deposition, p. 17).

Thus in practice, as the court below noted, "the system operate[s] exactly in reverse from what the state statutes contemplate." (A-12a) It produces a small group of individually selected or recommended names for consideration, provided by white administrators and citizens with limited contact with the Negro community. No meaningful procedure exists for the inclusion of Negro names.

Evidence produced at the trial below established that although approximately 74% of the male population of Green County over 21 years of age was Negro, at no time during the period from 1961 to 1966 did the percentage of Negroes on the jury roll exceed 19% (Summary of Evidence, R.132).

The 1961 jury roll was 95% white, 5% Negro. Before the extraordinary session of January 1967, it had become 81% white, 19% Negro (Summary of Evidence, R.132).

After the extraordinary session, in which women were added to the roll for the first time, it was 68% white, 32% Negro (Summary of Evidence, R.132). This is to be contrasted with the estimate of population at that time of 65% Negro and 35% white (A-15a).

Appellants contend that this gross disparity resulted not only from the discriminatory administration of the statutes as the district court found but principally from the vague statutory standards for juror qualification which invested the all white jury commissioners with sufficient discretion to permit them to discriminate on racial grounds.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

Code of Alabama, Title 30, §21 Is Unconstitutionally Vague Because It Permits the Arbitrary Exclusion of Negroes From Service As Jurors In Violation of the Fourteenth Amendment to the Constitution of the United States.

Alabama's statutory standards for prospective jurors are vague. Jury Commissioners must select only those persons:

“generally reputed to be honest and intelligent . . . and . . . esteemed in the community for their integrity, good character and sound judgment.” Code of Ala., Tit. 30, §21.

In numerous cases involving a variety of rights, this Court has declared similar statutory or regulatory language permitting public officials to make subjective decisions unconstitutionally vague: *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921); economic regulation legislation:

"Unreasonable Charges"; *Baggett v. Bullitt*, 377 U.S. 360 (1964), due process: "subversive person"; *Herndon v. Lowry*, 301 U.S. 242 (1937), free speech and assembly: "insurrection"; *Winters v. New York*, 333 U.S. 507 (1948), due process and freedom of the press: "obscene".

In *Staub v. City of Baxley*, 355 U.S. 313 (1958), the Court applied the rule to an ordinance which prohibited soliciting without a license from the mayor and city council who, in passing upon the application were to consider the character of the applicant. Similarly, a statute requiring a certificate of "good moral character" as a prerequisite to college admission was invalidated by the Fifth Circuit. *Board of Supervisors v. Ludley*, 252 F.2d 372 (5th Cir. 1958), cert. denied, 358 U.S. 819 (1958).

Because Alabama's statutory qualifications are vague, they furnish jury commissioners with an opportunity to discriminate on a variety of grounds. Cf. *Whitus v. Georgia*, 385 U.S. 545, 552 (1967); *Bostick v. South Carolina*, 386 U.S. 479 (1967).

In the hands of all-white jury commissioners, against the backdrop of the racial history of the state and region, Alabama's vague statutory standards provide an opportunity to discriminate on racial grounds. Cf. *Louisiana v. United States*, 380 U.S. 145 (1965); *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.), aff'd *per curiam*, 336 U.S. 933 (1949). In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), this Court, at pp. 312-313 said:

"... the good morals requirements is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials."

The record in this case shows that the opportunity to discriminate racially has been resorted to in Greene County. Statistics in the record show:

*1960 Census, Greene County
Persons over 21 Years of Age*

	White	% White	Negro	% Negro
Male	775	26%	2,247	74%
Female	874	24%	2,754	76%
Total	1,649		5,001	

*Composition of Jury Rolls
1961-65 (Males Only)²*

Year	White Males on Jury Rolls	% of 1960 Pop. (White Males)	Negro Males on Jury Rolls	% of 1960 Pop. (Negro Males)
1961	337	43%	16	0.7%
1962	348	45%	26	1%
1963	349	45%	28	1%
1964	—	—	—	—
1965	382	49%	47	2%
1966	389	50%	82	4%

(A-14a)

The statistics post-1964 are particularly pertinent for they reflect the jury commission's performance subsequent to a declaratory judgment by the district court directing that the jury selection system be administered in a racially nondiscriminatory way. *Coleman v. Barton*, No. 63-4 (N.D. Ala. June 10, 1964 (A-3a)).³ In 1967 the number of whites on the jury roll was increased to 810 or 49% of the 1960 census figures for adult whites. Negroes on the roll in-

² Until 1966 Alabama restricted jury service to males. See *White v. Crook*, 241 F.Supp. 401 (M.D. Ala. 1966); Code of Ala. (Supp. 1967) Tit. 30, §21.

³ Subsequently, in a direct review of Coleman's murder conviction, this Court held that an un rebutted *prima facie* case of systematic racial exclusion in jury selection in Greene County had been established. *Coleman v. Alabama*, 389 U.S. 22 (1967).

creased to 388 or 71½% of the 1960 census figure for Negro adults.⁴

The Court below found that the practice of racial discrimination in jury selection had continued but limited its relief to an injunction against discriminatory administration of the Alabama statute (A-27a), thus leaving untouched the vague statutory standards which, by lodging excessive discretion in the hands of the all-white jury commissioners, are chiefly accountable for the result of racially discriminatory jury selection in Greene County and elsewhere in the state.

This relief was clearly inadequate. As the Fifth Circuit has said: "It is this broad discretion located in a non-judiciary office which provides the source of discrimination in the selection of juries." *Labat v. Bennett*, 365 F.2d 698, 713 (5th Cir. *en banc* 1966); see also *Smith v. Texas*, 311 U.S. 128 (1940); *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. *en banc* 1966). Just four years ago the selection practices of the Greene County jury commission were declared racially discriminatory and ordered discontinued, but as the record shows, the practices have persisted. They have persisted principally because Alabama's statutory scheme permitted white jury officials to continue finding almost no Negroes who in their judgment could meet the intelligence and character standards of the statute. *Coleman v. Barton*, *supra*.

⁴ There was testimony at the trial below that by 1967, through migration of Negroes, the population ratio for all Negroes and all whites had decreased to 65%-35%. In its opinion, the Court said:

"Assuming that this change was reflected in the numbers of adults as in non-adults, and that the number of adult whites remained approximately constant, then the approximate number of adult Negroes in the county (male and female) had declined from 5001 to 3065, of whom approximately 12½% were on the rolls in 1967 after the January special meeting." (A-15a).

Because Title 30, §21 is of state-wide applicability, it is not surprising that the problem exposed in Greene County is not restricted to it, but is state-wide. Civil suits successfully challenging racially discriminatory jury selection have been brought in federal district courts in counties throughout the state of Alabama. See, e.g., *Dennard, et al. v. Baker*, C.A. 2654-N (M.D. Ala. 1968) (Barbour County); *Hadnott, et al. v. Narramore*, C.A. 2681-N (M.D. Ala. 1968) (Autauga County); *McNab, et al. v. Griswold*, C.A. 2653 (M.D. Ala. 1968) (Bullock County); *Palmer, et al. v. Steindorff*, C.A. 2679-N (M.D. Ala. 1968) (Butler County); *Bush, et al. v. Woolf*, C.A. 68-206 (N.D. Ala. 1968) (Calhoun County); *Good, et al. v. Slaughter*, C.A. 2677-N (M.D. Ala. 1968) (Crenshaw County); *Banks, et al. v. Holley*, C.A. 735-E (M.D. Ala. 1967) (Tallapoosa County); *Turner v. Spencer*, 261 F.Supp. 342 (S.D. Ala. 1966) (consolidated from cases which arose in Perry, Hale and Wilcox Counties); *Mitchell v. Johnson*, 250 F. Supp. 117 (M.D. Ala. 1966) (Macon County); *White v. Crook*, 241 F.Supp. 401 (M.D. Ala. 1966) (Lowndes County); *Reese, et al. v. Pickering*, C.A. 3839-65 (S.D. Ala. 1968 (Dallas County)).

Similar cases have been initiated and are pending in the following counties: *Huff, et al. v. White*, C.A. 68-223-N (M.D. Ala.) (Bibb County); *Palmer, et al. v. Davis*, C.A. 967-S (M.D. Ala.) (Dale County); *Jones, et al. v. Holliman*, C.A. 3944-65 (S.D. Ala.) (Marengo County); *Preston, et al. v. Mandeville*, C.A. 5059-68 (S.D. Ala.) (Mobile County); *Richardson, et al. v. Wilson*, C.A. 68-300 (N.D. Ala.) (Jefferson County); *Jones, et al. v. Wilson*, C.A. 66-92 (N.D. Ala.) (Jefferson County), pending on appeal *sub nom Salary v. Wilson* (No. 25978, 5th Cir.).

These cases impose a heavy burden on already crowded court dockets, however their necessity will continue until jury selection throughout the state is made on the basis of

objective standards. This has been the response of Congress with respect to invidious discrimination in federal jury selection,⁶ and in the area of voting rights.⁷

Until there are objective standards to guide the discretion of jury selectors in Alabama an effective cure to problems of racially disproportionate jury rolls is unlikely.⁷

⁶ 28 U.S.C. §1865: Qualifications for Jury Service

(b) In making such determination [i.e., juror qualifications], the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

⁶ Voting Rights Act of 1965 (42 U.S.C. §1973 et seq.).

⁷ See Kuhn, "Jury Discrimination: The Next Phase," 41 U.S.C. Law Rev. 235, 266-82 (1968); Note, "The Congress, The Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966," 52 Va. L.Rev. 1069, 1140-56 (1966).

II.

The Jury Commission of Greene County Is Unconstitutionally Constituted Because It Perpetuates Racially Discriminatory Juror Selection In Violation of the Fourteenth Amendment to the Constitution of the United States.

The non-objective standards of juror qualification are a crucial element in racially discriminatory juror selection, as appellants have urged. An equally crucial and inter-related element is the racial composition of Alabama's jury commissions.

Jury commissions are appointed by the Governor. (Code of Ala., Tit. 30, §10); members are required to be persons "reputed for their fairness, impartiality, integrity and good judgment." Code of Ala. (Supp. 1967) Tit. 30, §9.

The Court below held that "the attack on the racial composition of the commission fails for want of proof." (A-20a). However, the record established by compelling inference the causal relationship between the all-white characteristic of the Greene County jury commission, the excessive statutory discretion and the resulting racial discrimination in selection.

Assuming the sincere impartiality of all-white jury commissioners "in the reality of the segregated world," (*Brooks v. Beto*, 366 F.2d 1, 12 (5th Cir. *en banc*, 1966)), the likelihood that they would normally be in a position to know very many Negroes who are "generally reputed to be honest and intelligent . . . and esteemed in the community for . . . integrity, good character and sound judgment," is slight. Also, given the reality of that world, Negroes generally are regarded by white jury officials as incapable of meeting those standards.

The Clerk of the Greene County commission testified that for the previous eleven years all of the commissioners had been white (T.88). It is judicially noticeable that a Negro has never been appointed to a jury commission in the state of Alabama. There was also evidence that the clerk and the three members of the jury commission (one of whom was seriously ill and another who was new to the commission and had not yet participated in selection) were almost totally unfamiliar with the Negro community and relied instead on only eight Negroes and fourteen whites for recommendations. In fact, the Clerk and one commissioner used the same Negro for recommendations (T.182).

The too-discretion-giving provisions of §21 (Code of Ala. Tit. 30) are a vice no matter by whom administered,³ but certainly in the context of racially segregated southern society, excessive discretion in the hands of all-white officials is fatal to Negro participation in jury service as it was in voting. *Louisiana v. United States, supra*; *South Carolina v. Katzenbach, supra*.

Thus so long as the statutory standards of selection remain unchanged, it is of crucial importance that a jury commission be representative of the *whole* community in which it functions. *Brooks v. Beto, supra*. Particularly must this be so with respect to communities like Greene in which Negroes constitute so large a majority of the residents.

³ The provisions of §21 would allow the continued exclusion of most of the eligible Negroes by virtue of the fact that its provisions could be misapplied by Negro appointees deemed to be "safe". Cf. *Brooks v. Beto, supra*, Judge Wisdom, concurring opinion.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

Respectfully submitted,

.....
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APPENDIX

APPENDIX

APPENDIX

Opinion by Godbold, C.J.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA,

WESTERN DIVISION

Civil Action No. 66-562

PAUL M. BOKULICH, WILLIE CARTER, SR., JOHN HEAD, REV.
PERCY McSHAN, on their own behalf and on behalf of
all others similarly situated,

Plaintiffs,

—and—

GEORGE GREENE and HUBERT G. BROWN,

Intervenors-Plaintiffs,

—v.—

JURY COMMISSION OF GREENE COUNTY, ALABAMA, WALTER
MORROW, ALBERT GRAY, and MELVIN DURRETTE, as mem-
bers of the Jury Commission of Greene County, Ala-
bama, MARY C. YARBOROUGH, as Clerk of the Jury Com-
mission of Greene County, Alabama, E. F. HILDRETH, as
Circuit Judge for the 17th Judicial District of Alabama,
T. H. BOGGS, as District Attorney for Greene County,
Alabama, RALPH BANKS, JR., as County Attorney for
Greene County, Alabama, and LURLENE B. WALLACE, as
Governor of the State of Alabama,

Defendants.

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Before GODBOLD, Circuit Judge, and GROOMS and ALLGOOD, District Judges.

GODBOLD, Circuit Judge:

This suit is an attack on the jury system of Greene County, Alabama. The plaintiffs charge that there is systematic exclusion of Negroes from grand and petit juries by reason of purposeful discrimination, in violation of the Constitution of the United States and the Constitution of the State of Alabama. They charge that Tit. 30, §§4 and 21 of the Code of Alabama (1958) establishing qualifications for jurors are, on their face and as applied, in violation of the Fourteenth Amendment to the Constitution of the United States. And they claim that the all-white jury commission of Greene County is unconstitutionally constituted.

Both declaratory and injunctive relief are sought. Jurisdiction of this court is invoked under 28 U.S.C. §1343 and 42 U.S.C.A. §1983. A three-judge court has been convened pursuant to 28 U.S.C.A. §2281. Notice of the suit has been given to the Attorney General and Governor of Alabama as required by 28 U.S.C.A. §2284(2).

The court has considered the evidence consisting of oral testimony, testimony by deposition, numerous exhibits, and stipulations of the parties, and pursuant to Fed. R. Civ. P. 52 makes and enters in this opinion the appropriate findings of fact and conclusions of law.

Each plaintiff sues on his own behalf and, pursuant to Fed. R. Civ. P. 23, on behalf of a class of those similarly situated. Plaintiff Paul Bokulich is a white civil rights worker associated with the Southern Christian Leadership Conference. He was arrested in Greene County and charged with two counts of grand larceny. His arrest followed soon after a sharply-contested primary election in which Negroes were successful candidates for county

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office. Plaintiffs Willie Carter, Sr., John Head and Rev. Percy McShan are Negro residents of Greene County who allege that they are qualified under the laws of Alabama to serve as jurors in the Circuit Court of Greene County and desire to serve but never have been summoned for jury service. Plaintiffs-intervenors George Greene and Hubert G. Brown are Negro civil rights workers for the Student Non-Violent Coordinating Committee. While working in Greene County in connection with the general election to be held in November 1966 they were arrested on charges of grand larceny.

Temporary restraining orders have been granted against presentation to the Greene County grand jury of charges against Bokulich, Greene and Brown.

The defendants are the members and the clerk of the Greene County jury commission, the Circuit Judge and District Attorney of the state judicial circuit in which Greene County is located, the County Attorney, and the then Governor of Alabama.

The claim of systematic exclusion of Negroes from the Greene County jury roll has been in the courts before. *Coleman v. Barton*, No. 63-4, N.D. Ala., June 10, 1964, was a suit against the members and clerk of the jury commission. The district judge granted a declaratory judgment but on grounds of comity declined to grant injunctive relief. Pertinent extracts from the judgment then entered are as follows:

"1. The Jury Commission of Greene County, Alabama, is under a statutory duty of seeing that the names of every person possessing the qualifications to serve as jurors, and not exempt by law from jury duty, be placed on the jury roll and in the jury box of said County.

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"2. The Clerk of the Jury Commission of Greene County, Alabama, is under a duty to comply with Section 24 of Title 30 of the Code of Alabama, 1940, to visit every precinct in Greene County at least once a year to enable the Jury Commission to properly perform its duties as Commissioners as required by law.

"3. The jury commissioners of Greene County, Alabama, are under a duty to familiarize themselves with the qualifications of eligible jurors without regard to race or color.

"4. The jurors be selected and the roll made up and the box filled on the basis of individual qualifications and not as a member of a race.

"5. No person otherwise qualified be excluded from jury service because of his race.

"6. The Commission not pursue a course of conduct in the administration of its office which will operate to discriminate in the selection of jurors on racial grounds.

"7. In making up and establishing the jury roll and in filling the jury box mere symbolic or token representation of Negroes will not meet the constitutional requirements and that numerical or proportional limitations as to race are forbidden.

"8. The jury roll and the jury box as presently constituted be examined for compliance with these standards and the declaration herein made."

Contemporaneously the same Coleman was making his way through the state courts, and the United States Supreme Court, on a direct appeal from a conviction of

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murder in Greene County.¹ The conclusion of the United States Supreme Court in its second opinion, 389 U.S. 22, 88 S.Ct. 2, 19 L.Ed. 2d 22, was that Coleman had established a prima facie case of denial of equal protection by systematic exclusion of Negroes from Greene County juries, and the state had not adduced evidence sufficient to rebut the prima facie case.

1. Standing.

Brown and George Greene are Negroes, charges against whom are proposed to be submitted to the grand jury. Their standing to sue is apparent. Bokulich does not lack standing because he is white. *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966); *United States v. Hunt*, 265 F. Supp. 178 (W.D. Tex., 1967); *Allen v. State*, 110 Ga. App. 56, 137 S.E. 2d 711 (1964); *State v. Lowry*, 263 N.C. 536, 139 S.E. 2d 870 (1965).²

¹ *Coleman v. State*, 276 Ala. 513, 164 So. 2d 704 (1963), *rev'd*, 377 U.S. 129, 84 S.Ct. 1152, 12 L.Ed. 2d 190 (1964), remanded after reversal to trial court for hearing on motion for new trial, 276 Ala. 518, 164 So. 2d 708 (per curiam), 280 Ala. 509, 195 So. 2d 800 (affirming trial court's denial of motion for new trial), *rev'd*, 389 U.S. 22, 88 S.Ct. 2, 19 L.Ed. 2d 22 (1967) (per curiam), judgment affirming trial court vacated, conviction annulled and remanded with direction to quash the indictment, Nov. 27, 1967, unpublished order, Ala. Sup. Ct. (2d Div. 487).

² *Murphy v. Holman*, 242 F. Supp. 480 (M.D. Ala. 1965), *Blauvelt v. Holman*, 237 F. Supp. 385 (M.D. Ala. 1964), *Hollis v. Ellis*, 201 F. Supp. 616 (S.D. Tex. 1961), and *Alexander v. State*, 160 Tex. Crim. App. 460, 274 S.W. 2d 81, *cert. denied* 348 U.S. 872, 75 S.Ct. 108, 99 L.Ed. 686 (1954), hold that a white man may not raise the issue of exclusion of Negroes from the jury. In none of those cases was there shown to be substantial identity of interest or concern of the complaining party with the group alleged to be ex-

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Head was shown to meet standards for jurors established by Alabama law.³ We find that he represents the interests of a class composed of Negro citizens of Greene County qualified under state law for jury service, entitled to be considered for such service, and in such consideration to have applied to them non-discriminatory standards and procedures, and as such he has standing to sue. *Billingsley v. Clayton*, 359 F.2d 13 (5th Cir.), cert. denied 385 U.S. 841, 87 S.Ct. 92, 17 L.Ed. 2d 74 (1966); *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966); *Mitchell v. Johnson*, 250 F. Supp. 117 (M.D. Ala. 1966); *Brown v. Rutter*, 139 F. Supp. 679 (W.D. Ky. 1956).

2. The selection methods of the jury commission.

There is a jury commission of three members in each county appointed by the governor. The clerk of the Circuit Court may be employed as clerk of the commission, Tit. 30, §15, and in Greene County was so employed. The commission is charged with the duty of preparing a jury roll containing the name of every citizen living in the county who possesses the prescribed qualifications and who is not exempted by law from serving on juries. Tit.

cluded. We are concerned with the essential realities of the situation. The case in which the complaining party is of the same racial group as that alleged to be excluded is the clearest instance of potential violation of equal protection, but it does not set the outer limits of equal protection guarantees or of the right to complain of violations thereof. Nor does the "same class" theory limit due process, the requirements of basic fairness of trial and the integrity of the fact finding process. In the exclusion of an identifiable class from jury service equal protection and due process merge. *Labat v. Bennett*, supra; *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71, 81 (5th Cir. 1959).

³ There was no such proof as to McShan and Carter.

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30, §§20, 21 and 24. Tit. 30, §21 prescribes the qualifications and is quoted in the margin.⁴

The statutory scheme for the selection process begins with the names of substantially all persons potentially eligible for jury service and that group then is narrowed to exclude those not eligible. Sec. 18 provides:

The clerk of the jury commission shall, under the direction of the jury commission obtain the name of every citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence and place of business, and shall perform all such other duties required of him by law under the direction of the jury commission.⁵

This section, as well as §§20 and 21, was amended by Act No. 285, Acts of Alabama, Special Session 1966, p. 428, adopted September 12, 1966, so as to embrace all citizens rather than male citizens only.

⁴ "Section 21. The jury commission shall place on the jury roll and in the jury box the names of all citizens of the county who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless willing to do so. When any female shall have been summoned for jury duty she shall have the right to appear before the trial Judge, and such Judge, for good cause shown, shall have the judicial discretion to excuse said person from jury duty. The foregoing provision shall apply in either regular or special venire."

⁵ Under §21 persons over the age of 65 are not required to serve but may do so if willing.

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The commission is directed to require the clerk to scan the registration lists, the tax assessor's lists, any city directories and telephone directories "and any and every source of information from which he may obtain information, and to visit every precinct at least once each year." Tit. 30, §24.

Necessarily there are two steps in the selection of jurors for the jury roll. First there must be a selection of persons to be considered, i.e., the persons to whom the commissioners are to apply the statutory qualifications. Then the criteria of the statutes must be applied to those who are up for consideration.^{5a} The end product of the system established by the Alabama legislature is placing on the jury roll the names of all adult persons who are qualified and not exempted. "The jury commission * * * shall make in a well bound book a roll containing the name of every citizen living in the county who possesses the qualifications herein prescribed and who is not exempted by law from serving on juries." Tit. 30, §20. "The jury commission shall place on the jury roll and in the jury box the names of all citizens of the county who are generally reputed (etc.)." Tit. 30, §21. "The jury commission is charged with the duty of seeing that the name of every person possessing the qualifications prescribed in this chapter to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box." Tit. 30, §24. These directions of the statute have been reaffirmed by the Supreme Court of Alabama:

^{5a} "The sole purpose of these requirements [of the full list directed by §18, and use of the sources of information directed by §24 to be considered] is to insure that the jury commissioners will have as complete a list as possible of names, compiled on an objective basis, from which to select qualified jurors." *Mitchell v. Johnson*, 250 F. Supp. 117, 123 (M.D. Ala. 1966).

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The first step [in obtaining jurors to serve on grand and petit juries] is to get only qualified men on the jury roll. That is those having the qualifications prescribed by law and not exempt. The names of all such men in the county should be placed on the roll and in the jury box each year.

Fikes v. State, 263 Ala. 89, 95, 81 So. 2d 303, 309 (1955), *rev'd on other grounds*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed. 2d 246 (1957), and by the Court of Appeals of Alabama, *Inter-Ocean Casualty Co. v. Banks*, 32 Ala. App. 225, 23 So. 2d 874 (1945). Failure to put on the roll the name of every qualified person may not be the basis for quashing an indictment or venire absent fraud or a denial of constitutional rights, *Fikes v. State*, *supra*, at 96, 81 So. 2d at 309, but substantial compliance with these legislative safeguards established to protect litigants and to insure a fair trial by an impartial jury is necessary in order to safeguard the administration of justice. *Inter-Ocean Casualty Co. v. Banks*, *supra*.

The manner in which the system actually works in Greene County is generally as follows. The clerk does not obtain the names of all potentially eligible jurors as provided by §18, in fact was not aware that the statute directed that this be done and knew of no way in which she could do it. The starting point each year is last year's roll. Everyone thereon is considered to be qualified and remains on the roll unless he dies or moves away (or, presumably, is convicted of a felony). New names are added to the old roll. Almost all of the work of the commission is devoted to securing names of persons suggested for consideration as new jurors. The clerk performs some duties directed toward securing such names. This is a part-time task, done

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without compensation, in spare time available from performance of her duties as clerk of the Circuit Court. She uses voter lists but not the tax assessor's lists. Telephone directories for some of the communities are referred to, city directories not at all since Greene County is largely rural.

The clerk goes into each of the eleven beats or precincts annually, usually one time. Her trips out into the county for this purpose never consume a full day. At various places in the county she talks with persons she knows and secures suggested names. She is acquainted with a good many Negroes, but very few "out in the county." She does not know the reputation of most of the Negroes in the county. Because of her duties as clerk of the Circuit Court the names and reputations of Negroes most familiar to her are those who have been convicted of crime or have been "in trouble." She does not know any Negro ministers, does not seek names from any Negro or white churches or fraternal organizations. She obtains some names from the county's Negro deputy sheriff.

The commission members also secure some names, but on a basis no more regular or formalized than the efforts of the clerk. The commissioners "ask around," each usually in the area of the county where he resides, and secure a few names, chiefly white persons.⁶ Some of the names are obtained from public officials, substantially all of whom are white.

⁶ The commissioner who concentrates on four precincts in the south of the county could not say that he visited each of those precincts in the year August 1965-August 1966. The commissioner who had been concentrating on the northern precincts had been ill in August 1966, and his participation in affairs of the commission around that time is acknowledged to have been nominal.

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One commissioner testified that he asked for names and that if people didn't give him names he could not submit them.⁷ He accepts pay for one day's work each year, stating that he does not have a lot of time to put on jury commission work. The same commissioner considered that Negroes are best able to judge which Negroes are good and outstanding citizens and best qualified for jury service, that the best place to get information about the Negro citizen is from Negroes. He takes the word of those who recommend people, checks no further and sees no need to check further, considering that he is to rely on the judgment of others.^{7a} He makes no inquiry or determination whether persons suggested can read or write, although §21 excludes persons who cannot read English. Neither commissioners nor clerk have any social contacts with Negroes or belong to any of the same organizations.

Through its yearly meeting in August, 1966, the jury commission met once each year usually for one day, sometimes for two, to prepare a new roll.⁸ New names presented by clerk and commissioners, and some sent in by letter, were considered. The clerk checked them against

⁷ A portion of his testimony was as follows:

Q. And these are the four precincts you provided names for? A. That I sort of worked around.

Q. Am I also correct you could not find any list that you submitted to the jury commission? A. I couldn't find them when they wouldn't submit them to me.

Q. Pardon A. They were not submitted; there was no way for me to find them: I asked for them, and that is all I could do; if they don't send them, I can't submit them.

^{7a} The clerk testified that if one recommending another for jury duty did not know the reputation of the person recommended there was no way for her to find it out.

⁸ An annual meeting is required to be held between August 1 and December 20. Tit. 30, §20.

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court records of felony convictions. New names decided upon as acceptable were added to the old roll. The names of those on the old roll who had died or moved away were removed.

At the August, 1966 meeting one commissioner was new and submitted no names, white or Negro, and merely did clerical work at the meeting. Another had been ill and able to seek names little if at all. The third could remember one Negro name that he suggested. This commissioner brought the name, or names, he proposed on a trade bill he had received, and after so using it threw it away. All lists of suggested names were destroyed. As a result of that meeting the number of Negro names on the jury roll increased by 37. (Approximately 39 were added but it is estimated that two were lost by death or removal outside the country.) Approximately 32 of those names came from lists given the clerk or commissioners by others. The testimony is that at the one-day August meeting the entire voter list was scanned. It contained the names of around 2,000 Negroes.

Thus in practice, through the August, 1966 meeting the system operated exactly in reverse from what the state statutes contemplate. It produced a small group of individually selected or recommended names for consideration. Those potentially qualified but whose names were never focused upon were given no consideration. Those who prepared the roll and administered the system were white and with limited means of contact with the Negro community. Though they recognized that the most pertinent information as to which Negroes do, and which do not, meet the statutory qualifications comes from Negroes there was no meaningful procedure by which Negro names were fed into the machinery for consideration or effectual means

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of communication by which the knowledge possessed by the Negro community was utilized. In practice most of the work of the commission has been devoted to the function of securing names to be considered. Once a name has come up for consideration it usually has been added to the rolls unless that person has been convicted of a felony. The function of applying the statutory criteria has been carried out only in part, or by accepting as conclusive the judgment of others, and for some criteria not at all.

Testimony that most of the emigration out of the county is by younger and better educated Negroes, tending to leave in the county those older and illiterate, proves little in the overall picture. In late 1966 there were at least an estimated 2,000 Negroes on the voting rolls.^{*} The minimum voting age in Alabama is 21. It cannot be presumed that all of these adults, or anywhere near all, were over age 65, which in any event is a basis for excuse and not exclusion, or were unable to read English and not freeholders. (In any event it appears that the requirement of ability to read English has been the subject of little inquiry.)

The grand jury panel which met and would have considered the charges against Bokulich had it not been enjoined consisted of ten whites and eight Negroes. The racial composition of a single drawn jury panel cannot cure the disparity on the roll or the deficient system by which the roll is set up and maintained.

In January, 1967, after this suit was filed, an extraordinary session of the jury commission was held. Part of its work was to add females to the jury list, as a result of

^{*} Between November 8, 1965 and August 16, 1966 federal voting registrars registered approximately 1800 to 1900 Negroes as voters in Greene County.

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the September, 1966, amendments by the Alabama legislature extending jury service to women. The procedure for obtaining names to be added to the list, including the names of Negroes, was the same as that previously employed. There is evidence that more persons, including more Negroes, were asked for suggestions than in the past, but the system remained the same.¹⁰

3.

We turn to consideration of the statistical results produced by the operation of the system.

*1960 Census, Greene County,
Persons over 21 Years of Age*

	White	% White	Negro	% Negro
Male	775	26%	2,247	74%
Female	874	24%	2,754	76%
Total	1,649		5,001	

*Composition of Jury Rolls,
1961-65 (Males Only)*

Year	White Males on Jury Rolls	% of 1960 Pop. (White Males)	Negro Males on Jury Rolls	% of 1960 Pop. (Negro Males)
1961	337	43%	16	0.7%
1962	348	45%	26	1%
1963	349	45%	28	1%
1964	—		—	
1965	382	49%	47	2%
1966	389	50%	82	4%

¹⁰ "[T]he mere change in state law, whose previous commands had already been consciously ignored, did not remove the central

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The January, 1967 meeting of the jury commission increased the number of whites and Negroes, a substantial part of the increase coming from inclusion of females for the first time. Whites on the roll increased to 810, which was 49% of the 1960 census figure for adult white males and females. Negroes on the roll increased to 388, which was 7½% of the 1960 census figure for adult Negro males and females. There was testimony that by 1967, through migration of Negroes, the population ratio for all Negroes and all whites had decreased to 65%-35%. Assuming that this change was reflected in the numbers of adults as in non-adults, and that the number of adult whites remained approximately constant, then the approximate number of adult Negroes in the county (male and female) had declined from 5001 to 3065, of whom approximately 12½% were on the rolls in 1967 after the January special meeting. Recognizing the assumptions and approximations involved that prevent exact figures, the disparity is nevertheless evident, for at the same time approximately half of the adult whites (male and female) were on the rolls, a continuation of the previous practice of maintaining on the roll approximately half of the eligible white population.

In 1961 the jury roll was 95% white, 5% Negro. Before the extraordinary session of January 1967 it had become 81% white, 19% Negro. After the extraordinary session it was 68% white, 32% Negro. This is to be contrasted with the estimate of population at that time of 65% Negro and 35% white.

issue of the pattern and practice of racial discrimination. The change of merely one of the sources or tools of the conduct did not demonstrate a change in the conduct itself." Pullum v. Greene, 5 Cir. 1968, 396 F.2d 251, 254 (5th Cir. 1968).

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The discriminatory administration of jury selection laws fair on their face achieving a result of exclusion of Negroes from juries has been a violation of the Fourteenth Amendment for almost 100 years. *Neal v. Delaware*, 103 U.S. 370, 26 L.Ed. 567 (1881). Discrimination in the selection of grand juries has been the basis for reversal of state criminal convictions since 1883. *Bush v. Kentucky*, 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354 (1883).

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.

Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84, 86 (1940).

The Constitution does not require representation of a litigant's race on the jury panel which tries his case, *Bush v. Kentucky*, *supra*. It does not demand that the jury roll or venire be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965). It does require that there be no

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systematic exclusion of Negroes on account of race from participation as jurors in the administration of justice.¹¹

The statistical results produced by the system employed in Greene County, and the testimony of those who administer the system, establish that there is invalid exclusion of Negroes on a racially discriminatory basis. The *modus operandi* of the selection system, as described by those in charge of it, rather than satisfactorily explaining disparities reaffirms what the figures show, that there has been followed "a course of conduct which results in discrimination 'in the selection of jurors on racial grounds.'" ¹² *Davis v. Davis*, 361 F.2d 770 (5th Cir. 1966); *United States ex rel. Seals v. Wiman*, 304 F.2d 53 (5th Cir. 1962); *White v. Crook*, *supra*.

The Constitution casts upon jury commissioners, as judicial administrators, affirmative duties which must be carried out in order to have a constitutionally secure system.

—*Cassell v. Texas*, *supra*, at 289, 70 S.Ct. at 633, 94 L.Ed. at 848. "When the commissioners were appointed as judicial administrative officials, it was their duty to fa-

¹¹ Discrimination against Negroes is not the only factor producing imbalances in jury selection which may be unconstitutional. Prior to its recent amendment the provisions of Tit. 30, §21, quoted *supra*, denying women the right to serve on juries, was held unconstitutional. *White v. Crook*, *supra*. Exclusion of persons of identifiable national origin (Mexican-Americans) has been struck down. *Hernandez v. Texas*, 347 U.S. 475, 74 St.Ct. 667, 98 L.Ed. 866 (1954). Maryland has held invalid discrimination on religious grounds. *Schowgurow v. State*, 240 Md. 121, 213 A.2d 475 (1965). Those of low economic status have been kept off the rolls. E.g., *Labat v. Bennett*, *supra*. California has disciplined a prosecuting attorney who assisted the jury commissioner in eliminating defense-prone jurors from the jury rolls. *Noland v. State Bar*, 63 Cal.2d 298, 405 P.2d 129 (1965).

¹² *Akins v. Texas*, 325 U.S. 398, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692, 1696 (1945).

Opinion by Godbold, C.J.

miliarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color. They did not do so here, and the result has been racial discrimination. We repeat the recent statement of Chief Justice Stone in *Hill v. Texas*, 316 US 400, 404, 86 L ed 1559, 1562, 62 S Ct 1159:

‘Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case, discrimination necessarily results where there are qualified negroes available for jury service.’ ”

—*Avery v. Georgia*, 345 U.S. 559, 561, 73 S.Ct. 891, 892, 97 L.Ed. 1244, 1247 (1953): “The Jury Commissioners, and the other officials responsible for the selection of this panel, were under a constitutional duty to follow a procedure—‘a course of conduct’—which would not ‘operate to discriminate in the selection of jurors on racial grounds.’ *Hill v. Texas*, 316 US 400, 404, 86 L ed 1559, 1562, 62 S Ct 1159 (1942). If they failed in that duty, then this conviction must be reversed—no matter how strong the evidence of petitioner’s guilt.”

—*United States ex rel. Seals v. Wiman*, *supra*, at 65 (5th Cir. 1962): “Those same cases, however, and others, recognize a positive, affirmative duty on the part of the jury commissioners and other state officials. . . .”

Conscious or intentional failure of jury commissioners to carry out their duties, or evil motive, or lack of good faith, is not necessary for a system to be unconstitutional in its operation.

—*Vanleeward v. Rutledge*, 369 F.2d 584, 586 (5th Cir. 1966). “It is not necessary to determine that any of the

Opinion by Godbold, C.J.

commissioners, consciously or intentionally, failed to carry out the duties of their office, to conclude that the jury list from which the panel that tried Vanleeward was selected was totally defective."

—*United States ex rel. Seals v. Wiman, supra*, at 65. "[I]t is not necessary to go so far as to establish ill will, evil motive, or absence of good faith, but objective results are largely to be relied on in the application of the constitutional test."

The consequences of the discrimination resulting from failure to seek out and become acquainted with the qualifications of Negroes were described in *Smith v. Texas, supra*, at 132, 61 S.Ct. at 166, 85 L.Ed. at 87. "Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."

Alabama is among the most enlightened of the states in requiring that broadly inclusive community lists be consulted and that all eligible persons be shown on the rolls.¹³ The purpose of the Alabama system is to insure that the jury roll is a cross-section of the community. *White v. Crook, supra*; *Mitchell v. Johnson, supra*. Compliance with selection procedures set by a state legislature does not necessarily meet constitutional standards. But if a jury selection system as provided by the Alabama statutes is

¹³ See Note, *The Congress, The Courts and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 Va. L. Rev. 1069, 1079 n. 54 (1966).

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fairly and efficiently administered, without discrimination and in substantial compliance with the state statutes—which the state courts of Alabama already require—the odds are very high that it will produce a constitutional result of a jury fairly representative of the community. Failure to comply with state procedures does not necessarily produce an unconstitutional exclusion. But the fact of, and the extent of, the failure in this case to comply with the procedures and the results contemplated by the Alabama system is strong evidence of unconstitutionality.

The selection procedures are not validated by the fact that traditionally the system always has been that way, or that the clerk and the commissioners are in effect persons who as a public service contribute their time and effort, or that funds are not provided for the commission to operate in the manner directed by the state statutes and required by constitutional standards.

We hold that Negro citizens of Greene County are discriminatorily excluded from consideration for jury service, in violation of the equal protection clause of the Fourteenth Amendment, and that Tit. 30, §21 has been unconstitutionally applied as to them. We hold also that the discriminatory exclusion of Negroes is, as to the plaintiffs Bokulich, Brown and Greene, a violation of both equal protection and due process.

5.

The attack on racial composition of the commission fails for want of proof. No proof was adduced except that the commission in Greene County now is and for many years has been composed entirely of white men appointed by the governor.¹⁴

¹⁴ Cf. *Clay v. United States*, 5 Cir., — F.2d — [No. 24,991, May 6, 1968].

Opinion by Godbold, C.J.

The statutory criteria in §21 of good character, honesty, intelligence, integrity, sound judgment and sobriety are attacked as facially unconstitutional for vagueness. Many states join Alabama in some of these requirements and in excluding convicted felons.¹⁵ The Supreme Court has not held criteria such as these void for vagueness in the selection of jurors. And it has recognized the validity of wide discretion in jury commissioners. *Cassell v. Texas, supra*; *Franklin v. South Carolina*, 218 U.S. 161, 30 S.Ct. 640, 54 L.Ed. 980 (1910). We decline to hold §21 unconstitutional on its face.

Sec. 4, providing, "Any person who appears to the court to be unfit to serve on the jury, may be excused on his own motion, or at the instance of either party," also is alleged to be unconstitutional on its face. No reason, argument or authority is advanced in support of this allegation, and we decline to hold it facially unconstitutional.

The prayer that prosecutors be required not to reject jurors in exercise of peremptory challenges on account of race is denied. *Swain v. Alabama, supra*.

6. Relief

The plaintiff Head and the class which he represents are entitled to an injunction against discriminatory exclusion of Negroes from consideration for jury service in Greene County. In *Coleman v. Barton, supra*, in 1964 the single district judge stayed his hand and entered only a declaratory judgment. His abstention from granting injunctive relief was based in part on the fact that the general relief sought of him by Coleman as one of the plaintiffs encompassed the specific relief contemporaneously sought by

¹⁵ See Note, *supra* note 13, at 1073-74 n. 25-28.

Opinion by Godbold, C.J.

Coleman in state courts and the state courts should not be interfered with in their determination. In the judgment in that case the judge expressly left the door open for future injunctive relief, i.e., "[R]elief by way of injunction be and the same is thereby denied, but without prejudice as to future injunctive relief by further application herein or in any other proceedings." The declaration of rights and duties then made had not, as of January, 1967 produced a jury roll or a jury selection system meeting constitutional standards or purporting in real substance to carry out the mandate of the Alabama legislature. Coleman's litigation is now at an end. The plaintiffs in this case include Head as representative of the same general class as the plaintiffs other than Coleman in *Coleman v. Barton*. There is no occasion for further withholding of injunctive relief that will run to the benefit of other plaintiffs in *Coleman v. Barton* and in this case, and to which they are entitled.

The normal and most appropriate method for Bokulich, Brown and Greene to raise the composition of the jury roll and the operation of the jury selection system is in criminal prosecutions in the state courts, if indictments issue. *Stefanelli v. Minard*, 342 U.S. 117, 123, 72 S.Ct. 118, 121, 96 L.Ed. 138, 144 (1951); *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943). Their requests for injunctive relief will be denied.

The motion of the defendants to dismiss and the objections to the intervention by Brown and George Greene are to be overruled and denied. Dismissal on the merits will be entered as to all defendants other than the members and the clerk of the jury commission.

The attention of the defendants is directed to *Mitchell v. Johnson*, 250 F. Supp. 117(M.D. Ala. 1966), and to the

Opinion by Godbold, C.J.

recently decided case of *Turner v. Fouche et al.*, C.A. No. 1357, S.D. Ga., Aug. 1968. In *Mitchell* the jury commissioners of Macon County, Alabama, were directed to abandon the jury roll, and to compile a new jury roll in strict accordance with the law of Alabama and the applicable constitutional principles. The court pointed out the necessity of the clerk's compiling the master list directed by §18 and of the commission's employing the sources of information which the Alabama statutes direct by employed, so as to compile on an objective basis a list as complete as possible, and then to apply thereto the subjective standards of §21—good character, sound judgment, ability to read English, etc.—fairly and objectively to all in a non-discriminatory manner and without regard to race.

In *Turner* the jury commissioners of Taliaferro County, Georgia, a predominantly rural county comparable to Greene County, were informed by the court that the jury was illegally constituted because of exclusion of Negroes. Without the necessity of further orders of the court the county officials recomposed the jury list and reported to the court the results. The jury commissioners gave separate consideration to the name of every potentially eligible juror. If they lacked information about a particular individual they made inquiry in the community. Inquiries about Negroes were made of Negroes. Responsible Negroes were called upon to assist, and did assist, the jury commissioners. Specific eliminations were made based on poor health, citizens who were away from the county most of the time, persons requesting that they not be considered, persons about whom no information was available, and persons rejected as not conforming to the statutory standards of being intelligent and upright citizens. A Negro was appointed as clerk to the commission until such time

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as a Negro or Negroes could be appointed to membership.

Attention also is directed to the personal survey method employed by the jury board of Jefferson County, Alabama. *Billingsley v. Clayton*, 359 F.2d 13 (5th Cir. 1966).

Judgment will be entered in accordance with this opinion.

DONE this the 13 day of September, 1968.

/s/ JOHN C. GODBOLD
United States Circuit Judge

/s/ H. H. GROOMS
United States District Judge

/s/ C. W. ALLGOOD
United States District Judge

A TRUE COPY

WILLIAM E. DAVIS, *Clerk*
United States District Court
Northern District of Alabama

By: /s/ MARGARET M. HOEHN
Deputy Clerk

Judgment

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
WESTERN DIVISION
Civil Action No. 66-562

PAUL M. BOKULICH, WILLIE CARTER, SR., JOHN HEAD, REV.
PERCY McSHAN, on their own behalf and on behalf of
all others similarly situated,

Plaintiffs,

—and—

GEORGE GREENE and HUBERT G. BROWN,

Intervenors-Plaintiffs,

—v.—

JURY COMMISSION OF GREENE COUNTY, ALABAMA, WALTER
MORROW, ALBERT GRAY, and MELVIN DURRETTE, as mem-
bers of the Jury Commission of Greene County, Ala-
bama, MARY C. YARBOROUGH, as Clerk of the Jury Com-
mission of Greene County, Alabama, E. F. HILDRETH, as
Circuit Judge for the 17th Judicial District of Alabama,
T. H. BOGGS, as District Attorney for Greene County,
Alabama, RALPH BANKS, JR., as County Attorney for
Greene County, Alabama, and LURLENE B. WALLACE, as
Governor of the State of Alabama,

Defendants.

Judgment

Pursuant to the opinion filed in this case in lieu of formal findings of fact and conclusions of law under Rule 52, Fed. R. Civ. P.,

It is ORDERED, ADJUDGED, DECLARED and DECREED as follows:

1. There is systematic exclusion of Negroes from the jury rolls of Greene County, Alabama, by reason of purposeful discrimination, in violation of the Fourteenth Amendment to the Constitution of the United States.

2. Tit. 30, §21, Code of Alabama (1958), as amended, establishing qualifications for jurors, has been unconstitutionally applied to Negroes of Greene County, Alabama.

3. The motion to dismiss by defendants is overruled and denied. The intervention of George Greene and Hubert G. Brown is allowed and the objections thereto are overruled and denied.

4. The prayer of plaintiffs Paul M. Bokulich and plaintiffs-intervenors George Greene and Hubert G. Brown for injunction forbidding the grand jury of Greene County, Alabama, to consider criminal charges against them is denied.

5. The prayer that prosecutors in the Circuit Court of Greene County, Alabama, be enjoined from exercising peremptory challenges against jurors on account of race is denied.

6. The prayer that Tit. 30, §21, Code of Alabama (1958), as amended, and Tit. 20, §4, of said code, be declared unconstitutional on their face is denied.

Judgment

7. The prayer that the jury commission of Greene County, Alabama, be declared constituted in an unconstitutional manner is denied.

8. This action is dismissed on the merits as to defendants E. F. Hildreth, as Circuit Judge; Lurlene B. Wallace, as Governor; T. H. Boggs, as District Attorney; and Ralph Banks, Jr., as County Attorney.

9. The defendants Walter Morrow, Albert Gray and Melvin Durette, as members, and Mary C. Yarborough, as clerk, of the jury commission of Greene County, Alabama, and their successors in office, are hereby restrained and enjoined from systematically excluding Negroes from the jury roll of Greene County, Alabama, and from applying Tit. 30, §21, Code of Alabama (1958), as amended, to Negroes in a manner other and different from the manner in which applied to whites. The said defendants are ordered to take prompt action to compile a jury list for Greene County, Alabama, in accordance with the laws of Alabama and the constitutional principles set out in this judgment and in the opinion of the court entered this date. They are ordered to file with this court within sixty days a jury list as so compiled, showing thereon the information required by Tit. 30, §20, Code of Alabama (1958), as amended, plus the race of each juror, and if available the age of each juror, and a report setting forth the procedures, system and method by which said list was compiled and by which in the compilation thereof the qualifications for jurors, and the exclusions from jury service, provided by the laws of Alabama were applied to adult citizens of the county.

Judgment

10. The costs of this action to date are taxed against the defendants named in paragraph 9.

DONE, this the 13 day of September, 1968.

/s/ JOHN C. GODBOLD
United States Circuit Judge

/s/ H. H. GROOMS
United States District Judge

/s/ C. W. ALLGOOD
United States District Judge

A TRUE COPY

WILLIAM E. DAVIS, *Clerk*
United States District Court
Northern District of Alabama

By: /s/ MARGARET M. HOEHN
Deputy Clerk

Statutory Provisions Involved

The following additional provisions are material to an understanding of the issues presented.

Code of Alabama, Tit. 30, § 9. Membership, etc., of commissions.—Each of said jury commissions shall be composed of three members who shall be qualified electors of the county in which they are appointed and shall be men reputed for their fairness, impartiality, integrity and good judgment. Members of the commission shall not during the term for which they are appointed and during their tenure in said office hold any other office by appointment or election or perform any other public duty under the federal, state, county or municipal government, which carries with it any compensation whatsoever. (1939, p. 86.)

Code of Alabama, Tit. 30, § 10. Members to be appointed by governor.—The governor shall appoint the members of the several jury commissions who shall constitute said several commissions during the governor's tenure of office and until their successors are appointed and qualified, and thereafter the governor shall appoint the members of said jury commissions for and only during the tenure of office of the governor making the appointment and until their successors are appointed and qualified. (1939, p. 86.)

Code of Alabama, Tit. 30, § 18. Duties of Clerk.—The clerk of the jury commission shall, under the direction of the jury commission obtain the name of every male citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence and place of business, and shall perform all such other duties required of him by law under the direction of the jury commission. (1939, p. 86.)

*Statutory Provisions Involved***Code of Alabama, Tit. 30, § 20. Jury roll and cards.--**

The jury commission shall meet in the court house at the county seat of the several counties annually, between the first day of August and the twentieth day of December, and shall make in a well bound book a roll containing the name of every male citizen living in the county who possessed the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the jury commission shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business of every person selected, and if the residence has a street number it must be given. Upon the completion of the roll the jury commission shall cause to be prepared plain white cards all of the same size and texture and shall have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on each card. These cards shall be placed in a substantial metal box provided with a lock and two keys, which box shall be kept in a safe or vault in the office of the probate judge, and if there be none in that office, the jury commission shall deposit it in any safe or vault in the court house to be designated on the minutes of the commission; and one of said keys thereof shall be kept by the president of the jury commission. The other of said keys shall be kept by a judge of a court of record having juries, other than the probate or circuit court, and in counties having no such court then by the judge of the circuit court, for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept

Statutory Provisions Involved

securely and for the use of the jury commission exclusively. It shall not be inspected by anyone except the members of the commission or by the clerk of the commission upon the authority of the commission, unless under an order of the judge of the circuit court or other court of record having jurisdiction. (1939, p. 86; 1945, p. 496, appvd. July 7, 1945.)

Code of Alabama, Tit. 30, § 24. Duty of commission to fill jury roll; procedure; etc.—The jury commission is charged with the duty of seeing that the name of every person possessing the qualifications prescribed in this chapter to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box. The jury commission must not allow initials only to be used for a juror's name but one full Christian name or given name shall in every case be used and in case there are two or more persons of the same or similar name, the name by which he is commonly distinguished from the other persons of the same or similar name shall also be entered as well as his true name. The jury commission shall require the clerk of the commission to scan the registration lists, the lists returned to the tax assessor, any city directories, telephone directories and any and every other source of information from which he may obtain information, and to visit every precinct at least once a year to enable the jury commission to properly perform the duties required of it by this chapter. In counties having a population of more than one hundred and eighteen thousand and less than three hundred thousand, according to the last or any subsequent federal census, the clerk of the jury commission shall be allowed an amount not to exceed fifty dollars per calendar year to defray his expenses in

Statutory Provisions Involved

the visiting of these precincts, said sum or so much thereof as is necessary to be paid out of the respective county treasury upon the order of the president of the jury commission. (1939, p. 86.)

Code of Alabama, Tit. 30, § 30:

"At any session of a court requiring jurors for the next session, the judge, or where there are more than one, then any one of the judges of the court shall draw from the jury box in open court the names of not less than fifty persons to supply the grand jury for such session and petit juries for the first week of such session of the court, or if a grand jury is not needed for the session at least thirty persons, and as many more persons as may be needed for jury service in courts having more than one division for the first week, and after each name is drawn it shall not be returned to the jury box, and there shall be no selection of names, and must seal up the names thus drawn, and retain possession thereof, without disclosing who are drawn until twenty days before the first day of the session of the court for which the jurors are to serve, when he shall forward these names by mail or express, or hand the same to the clerk of the court who shall thereupon open the package, make a list of the names drawn, showing the day on which the jurors shall appear and in what court they shall serve, and entering opposite every name the occupation of the person, list place of business, and of residence, and issue a venire containing said names and information to the sheriff who shall forthwith summon the persons names thereon to appear and serve as jurors"

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In The

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Supreme Court of the United States DAVIS, CLERK

OCTOBER TERM 1968

NO.

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WILLIE CARTER SR., JOHN HEAD, REV. PERCY McSHAN,

Appellants

vs.

JURY COMMISSION OF GREENE COUNTY, ALABAMA,

et al.,

Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF ALABAMA**

MOTION TO DISMISS OR AFFIRM

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In The
Supreme Court of the United States

OCTOBER TERM 1968

NO. _____

WILLIE CARTER SR., JOHN HEAD, REV. PERCY McSHAN,

Appellants

vs.

JURY COMMISSION OF GREENE COUNTY, ALABAMA,
et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION TO DISMISS OR AFFIRM

The appellees move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the U. S. District Court for the Northern District of Alabama on the grounds that the questions presented are so unsubstantial as not to need further argument.

ARGUMENT

I

TITLE 30, SECTION 21 OF THE CODE OF ALABAMA, 1940, AS RECOMPILED 1958, IS NOT UNCONSTITUTIONALLY VAGUE.

Appellant contends that the standards prescribed by Title 30, Section 21, Code of Alabama 1940, Recompiled 1958, that prospective jurors be, "generally reputed to be honest and intelligent . . . and . . . esteemed in the community for their integrity, good character and sound judgment" are unconstitutionally vague for they provide jury commissioners who are to be guided by them in selecting prospective jurors with ". . . an opportunity to discriminate on racial grounds," in their selection of prospective jurors, in violation of the Fourteenth Amendment to the Constitution of the United States (Appellants' brief, pp. 10-11, Emphasis added).

Based on authority hereinafter discussed Appellee respectfully submits to this Honorable Court that such contention is unsound and unsupported by the decisions of this Honorable Court.

In *Strauder v. West Virginia*, 100 U.S. 303, ____ S. Ct. ____, 25 L. Ed. 664, decided March 1, 1880, this Honorable Court did hold that a State statute which confined jury service to "All white male persons . . . , " who possessed certain qualifications, was a denial to the colored man of the equal protection of the laws because the statute required discrimination against him because of his race. (See *Strauder*, *supra*, 100 U.S. at p. 303). But this Honorable Court said further:

"We do not say that, within the limits from which it is not excluded by the [Fourteenth] Amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th Amendment

was ever intended to prohibit this." (See *Strauder. supra*, 100 U.S. at p. 310). [In accord, see *Cassel v. Texas*, 339 U.S. 282 — S. Ct. —, 94 L. Ed. 839, decided April 24, 1950.]

In *Gibson v. Mississippi*, 162 U.S. 567, 16 S. Ct. 904, 40 L. Ed. 1075, decided April 13, 1896, this Honorable Court said of standards, "... 'that persons selected for jury service should possess good intelligence, sound judgment, and fair character' ... are always within the power of a [State] legislature to establish unless forbidden by the Constitution. They tend to secure the proper administration of justice and are in the interest, equally of the public and of persons accused of crime." (See *Gibson, supra*, 100 U.S. at p. 589, cited with apparent approval by this Honorable Court in *Georgia v. Rachel*, 384 U.S. 780, 86 S. Ct. 1783, 16 L. Ed. 2d 925, decided June 20, 1966, 384 U.S. at p. 804).

In *Smith v. Texas*, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84, decided November 25, 1940, this Honorable Court said that the Texas statutory scheme for jury selection which required jury commissioners to take an oath to not knowingly select a grand juror whom they believed unfit or unqualified, was "... not in itself unfair; it is capable of being carried out with no racial discrimination." (*Smith, supra*, 311 U.S. at p. 130).

Again, in *Hernandez v. Texas*, 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 886, decided May 3, 1954, this Honorable Court said of the aforementioned Texas system of juror selection that it was fair on its face although it was susceptible to abuse and could be employed in a discriminatory manner in violation of the Fourteenth Amendment. (347 U.S. at pp. 478, 479.)

It was in *Hernandez, supra*, that this Honorable Court said that the equal protection of the laws guarantee of the Fourteenth Amendment does not contemplate only two classes—white and Negro—but “. . . that the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws.” (See *Hernandez*, 347 U.S. at p. 477.)

In *Whitus v. Georgia*, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599, decided December 23, 1967, this Honorable Court said that “. . . we cannot say on this record that it [discrimination against Negroes] was not resorted to by the [jury] commissioners,” (385 U.S. at p. 552) under Georgia statutes requiring that the commissioners “select from the books of the tax receiver *upright* and *intelligent* citizens to serve as jurors, . . .” (385 U.S. at p. 548, Emphasis added), and from that group a sufficient number of “the *most experienced, intelligent, and upright* citizens to serve as grand jurors” (385 U.S. at p. 548, Emphasis added). This was due to the fact that the State offered no explanation for the disparity between the Negroes on the tax digest [the source from which prospective jurors were to be selected] and the percentage of Negroes on the venires, “. . . although the digest must have included the names of large numbers of ‘*upright* and *intelligent*’ Negroes as the statutory qualification required.” (385 U.S. at p. 552, Emphasis added.)

Appellee concedes, for arguments sake, that those standards prescribed by and set out in the quoted portion of Title 30, Section 21 of the Code of Alabama, *supra*, might possibly afford the jury commissioners in Alabama with an opportunity to discriminate on racial as well as other grounds in their selection of prospective jurors.

However, Appellee respectfully submits that any objective standards prescribed for the selection of prospective jurors could be susceptible to subjective discriminatory application in the hands of a commissioner so wrongfully inclined. Such mere susceptibility of misapplication does not render the standards unconstitutionally vague, as Appellant contends. And based on the aforementioned cases wherein this Honorable Court has apparently approved similar standards, although holding that they could have been, and in some cases were, misapplied, Appellee respectfully submits that Appellants' contention that the standards are unconstitutionally vague is unsupported by the decisions of this Honorable Court.

II

THE JURY COMMISSION OF GREENE COUNTY, ALABAMA IS CONSTITUTED IN A CONSTITUTIONAL MANNER.

The second question presented by the Jurisdictional Statement suggests that the Jury Commission of Greene County, Alabama is unconstitutionally constituted.

In the complaint filed in this action in the District Court, the plaintiffs sought a judgment declaring that "the Defendant Jury Commission of Greene County, Alabama is a deliberately segregated governmental agency appointed by Defendant Wallace, an official of the State of Alabama, in violation of the Fourteenth Amendment to the United States Constitution."

The District Court in its opinion, said that the "attack on racial composition of the Commission fails for want of proof." (Appellants' Appendix, p. 20a).

The statutes governing the composition of jury commissions in Alabama and the appointments thereto are found in Title 30, Sections 9 and 10, Code of Alabama 1940, as Recompiled 1958. (Appellants' Appendix, p. 29a).

The statutes (Sections 9 and 10, *supra*), provide that there be three members of the Commission, that they be electors or voters in the county, and that they be reputed for their fairness, impartiality, integrity and good judgment; they also provide that the Governor appoints the members to the Commission.

There is certainly nothing on the face of these two statutes that would cause them to be unconstitutional in any sense, and the District Court has found that the question of whether the statutes had been unconstitutionally applied was not proven.

This leaves petitioners with the argument that Sections 9 and 10, *supra*, are unconstitutional on their face because the past Commissioners have discriminated in the selection of Negroes for the jury roll. But it is difficult to connect the transgressions of the Commissioners *after* they become such to the process of their being selected as Commissioners so as to taint not only the selection process but the very basis of the authority to have jury commissioners in the first place.

It is suggested that this argument wholly fails to raise the issue of the unconstitutionality on its face of the selection process for jury commissioners in Alabama. Furthermore, the petitioners failed to point out any evidence that was presented to the trial court to establish that jury commissions were unconstitutionally selected or appointed. Nor did they

cite to this court any law which would enable it to decide whether or not the statutes in questions—Sections 9 and 10, *supra*—were facially unconstitutional.

The Court of Appeals for the Eighth Circuit, in the case of *Moore vs. Henslee*, 276 F. 2d 876, in deciding a question very similar to the one under discussion, said:

"The focal point of appellants' contention, as advanced in their brief and in oral argument, is that discrimination in the selection of jury panels in Miller County, Arkansas, is necessarily practiced because the Negro race is not represented on the jury commission which is composed of three citizens. It is suggested that 'it is almost impossible' for an all-white jury commission to keep informed of the habits and qualifications of the Negro population so that eligible members of that race can be selected for jury duty. We are not persuaded by this novel argument which fails to find support in either precedent or logic. Adoption of the principle contended for would require indulgence in the unwarranted presumption that jury commissioners entirely of one race will not discharge their 'duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color.' *Cassell v. State of Texas*, 339 U.S. 282, at page 289, 70 S. Ct. at page 633. Moreover, we are satisfied that the theory advanced by appellants would in reality lead to complexities in the administration of an important facet of our system of trial by juries. Application of the principle contended for, could not, in our view, be limited to the white and negro races. It would encompass all races, and the numerous nationalities and religious denominations existent in this country. The words of Mr. Justice Reed,

speaking for the Court in *Akins v. State of Texas*, 325 U.S. 398, at page 403, 65 S. Ct. 1276, at page 1279, seem to be peculiarly appropriate:

"The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds.'" (Emphasis supplied.)"

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed or that the decision of the three-judge U. S. District Court for the Northern District of Alabama should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert P. Bradley, one of the attorneys for the appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of February, 1969, I served a copy of the foregoing Motion to Dismiss or Affirm upon: Hon. Jack Greenberg, Hon. Norman C. Amaker, Hon. James N. Finney, 10 Columbus Circle, New York, New York 10019; Hon. Orzell Billingsley, Jr., 1630 Fourth Avenue, North, Birmingham, Alabama 35203, Attorneys for Appellants, by depositing a copy in the United States mail, first class postage prepaid, and properly addressed to each of them at the address given.

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IN THE

Supreme Court of the United States

October Term, 1968

No. ~~200~~ 30

WILLIE CARTER SR., JOHN HEAD, REV. PERCY McSHAN,

Appellants,

v.

JURY COMMISSION OF GREENE COUNTY, ALABAMA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR APPELLANTS

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IN THE
Supreme Court of the United States

October Term, 1968

No. 908

WILLIE CARTER SR., JOHN HEAD, REV. PERCY McSHAN,
Appellants,

v.

JURY COMMISSION OF GREENE COUNTY, ALABAMA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR APPELLANTS

Opinion Below

The opinion of the District Court for the Northern District of Alabama is not yet reported. The opinion is printed in the Appendix at pp. 346-369.

Jurisdiction

This is an action for injunctive and declaratory relief in which the jurisdiction of a district court of three judges was invoked under 28 U.S.C. §§ 1331, 1343, 2201, 2202, 2281, 2283 and 2284, and under 42 U.S.C. § 1981 to vindicate and enforce rights of the plaintiffs guaranteed by the due process and equal protection clauses of the Fourteenth Amend-

ment alleged to be violated by a statute of the state of Alabama (Title 30, § 21) governing the qualifications of jurors and by the practice of appointing only white jury commissioners by the State's Governor pursuant to Title 30, §§ 9 and 10, Code of Alabama (1958), as amended. A statutory three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284 (A. 28).

The final judgment of the Court below entered September 13, 1968, *inter alia*, adjudged that there was systematic exclusion of Negroes from jury rolls of Greene County, Alabama, by reason of purposeful discrimination and enjoined the jury commission, its clerk, and agents from such exclusion. However, the Court upheld the constitutionality of the challenged statutory provision and also refused relief with respect to the racial composition of the jury commission.

Notice of appeal on behalf of appellants Carter, Head, McShan, and the class they represent was timely filed on November 7, 1968 (28 U.S.C. § 2101(b) (A. 374). The Jurisdictional Statement was filed and the appeal was docketed January 6, 1969. Probable jurisdiction was noted March 3, 1969 (A. 378). Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1253.

Constitutional and Statutory Provisions Involved

This action involves the Fourteenth Amendment to the Constitution of the United States.

The primary statutory provision involved is Code of Alabama Title 30, Section 21, as amended which reads as follows:

"The jury commission shall place on the jury roll and in the jury box the names of all citizens of the County

who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless willing to do so. When any female shall have been summoned for jury duty she shall have the right to appear before the trial judge, and such judge, for good cause shown, shall have the judicial discretion to excuse said person from jury duty. The foregoing provision shall apply in either regular or special venire."

The following additional provisions are material to an understanding of the issues presented: Code of Alabama, Title 30, Sections 9, 10, 18, 20, 24 and 30. These enactments are set out in full in the Appendix at pp. 1a-4a, *infra*.

Questions Presented

I. Whether Code of Alabama, Title 30 § 21 is unconstitutional in violation of the Fourteenth Amendment because its requirement that jurors be persons "who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment" provides Alabama jury officials with the opportunity to discriminate on racial and other

grounds, an opportunity shown by the record to have been resorted to in this case?

II. Whether the appointment of only white jury commissioners in Greene County, Alabama, a county with a large majority black population is unconstitutional where:

(A) the white jury commissioners have resorted to the opportunity, provided by statute, to discriminate on racial grounds and have over a number of years consistently failed to produce jury rolls representative of the black majority population, and

(B) the appointment of black jury commissioners is needed to correct the effects of past discrimination and prevent its recurrence in the future, and

(C) the appointment of black commissioners will assure the representative participation of members of the county's majority citizens in the jury selection process?

Statement of the Case

This case, on appeal from a three-judge district court for the Northern District of Alabama, challenges the continuation of racial discrimination in Alabama's jury selection process by a statute (Code of Ala., Tit. 30 § 21) whose juror selection standards give excessive discretion to white jury officials to exclude all but a token number of Negroes from the opportunity for jury service. It arises from Greene County, Alabama, the locus of *Coleman v. Alabama*, 377 U.S. 129 (1964) (*Coleman I*); 389 U.S. 22 (1967) (*Coleman II*), the latter case holding (in the context of the criminal prosecution of a Negro defendant) that appellees here had discriminated racially in the jury selection process and, more recently, of *Hadnott v. Amos*, No. 647, Oct. Term 1968, 37 U.S.L. Week 4256 (March 25, 1969) in which

this Court held that black candidates for county and state-wide offices had been illegally excluded from the ballot.

The suit was filed below *sub nom* *Bokulich, et al. v. Jury Commission of Greene County, Alabama, et al.*, CA No. 66-562 (N.D. Ala.) on September 22, 1966 (A. 12). Appellants here are Negro citizens of Greene County who, as plaintiffs in the court below, represented the class of all Negroes potentially eligible for jury service in the county. They sought relief against the continued exclusion by the defendant jury commissioners and clerk of eligible Negro citizens of the county from jury service on racial grounds. They also challenged the constitutionality on its face of Title 30 § 21 of the Alabama Code and alleged that "the segregated, all-white Defendant JURY COMMISSION OF GREENE COUNTY, ALABAMA ("JURY COMMISSION") is unconstitutionally constituted" (A. 12). In their prayer, they requested an injunction against enforcement of the statute and against the continued appointment of only white persons to the Greene County Jury Commission (A. 26).

Other plaintiffs in the district court, Paul Bokulich, and intervening plaintiffs, Greene and Brown, sought an injunction against their criminal prosecutions in the state courts because of the alleged racial discrimination in the county's jury selection process. Though the three-judge district court, which was designated September 29, 1966 (A. 28) because of the attack on the constitutionality of the juror selection statute, held that there was racial discrimination (A. 371), this relief was denied (*ibid.*). On appeal here that portion of the district court's judgment was affirmed (*Bokulich v. Jury Commission of Greene County*, Oct. Term 1968, No. 1255 Misc.) (March 3, 1969).

After depositions of the jury commissioners were taken (A. 31, 107) and an answer filed (A. 29), trial was held on

June 6, 1967 (A. 119). At the trial, the evidence was that the clerk of the Greene County Jury Commission had served in that capacity for "twelve or thirteen years" (A. 224) and that since she had been clerk all members of the jury commission were white as was she (A. 177). Under Title 30 § 21, the jury commission is charged with the duty of making the initial selection of juror names. The commission, pursuant to Title 30 § 9, is composed of "three members who shall be qualified electors of the county in which they are appointed and shall be persons reputed for their fairness, impartiality, integrity and good judgment." Its members are appointed by the Governor (Code of Ala., Tit. 30 § 10) who was a defendant in the action. Their duties are described in detail in Title 30 §§ 20 (2a) and 24 (3a) and the duties of the clerk are set forth in Title 30 § 18 (1a). The primary responsibility of these officials is to choose from among the sources set forth in Title 30 § 24 the names of persons who, in their judgment, are eligible for jury service under the criteria of section 21, to include those names on the jury roll and to place cards corresponding to the names on the jury roll in a jury box from which the venires for trial are subsequently drawn. In preparing the jury roll the commissioners are directed to choose persons "who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment . . ." (Code of Ala., Title 30 § 21), the statutory provision challenged here. Neither this statute nor any other provision of Alabama law provides standards for guiding the commissioners choices.

The jury clerk testified at the trial that persons were put into the jury box "if there is nothing morally wrong with them and they are people of average intelligence" (A. 36). As far as Negroes were concerned, the clerk and the com-

missioners "made a conscientious effort" to place on the jury roll those "who were capable of serving that were clean morally" (A. 40). People "that were thought to be all right" (A. 61) were selected as potential jurors; people that were "sensible people as far as I know, or as far as the people that put them in their knew" (A. 102). The clerk (who is also the clerk of the circuit court) testified that she did not know the reputations of most Negroes in Greene County and that the reputations she did know were "mainly . . . the ones who have been in trouble"—"the bad reputations" (A. 208) and in at least one of the precincts she visited for the purpose of securing juror names, the only Negroes she knew were a few of the bootleggers (A. 201) but not any who were "respectable" (A. 202). She nor any of the jury commissioners had any social contact with Negroes (A. 185, 234).

One of the commissioners stated in his deposition that he and the other jury officials looked into "bad moral character" (A. 117) and very often relied on someone else's judgment as to whether a person was "morally all right and so forth" (A. 115). Indeed because, as the commissioner testified, "our knowledge [of Negroes] is limited" (A. 116), the commissioners used the subjective judgment of other people who the commissioners thought had "high principles and high standards" (A. 117) to determine if a person was fit for jury service. This jury commissioner was unable to say what standards he used for determining whether a person was a qualified juror:

"Now, what we consider qualified, that is something else. Actually you may be off in the way you are thinking of qualified, I don't know" (A. 116).

This commissioner also testified that he, personally, was not well acquainted with the Negro community (A. 234).

After the commissioners and jury clerk have applied their subjective judgment (or that of someone else) to selecting potential jurors, they meet each year in August to make up the jury roll and fill the jury box (A. 35). In August 1966, one of the commissioners was sick and did not take part in this process (A. 54), another was new to the job and supplied no names (A. 56), and a third brought a few names listed on the back of a bill he had received (A. 56-57, 210, 211, 357). In summarizing the efforts of the jury officials in securing the names of potential jurors, the court below said:

The clerk does not obtain the names of all potentially eligible jurors as provided by § 18, in fact was not aware that the statute directed that this be done and knew of no way in which she could do it.

• • •

Almost all of the work of the commission is devoted to securing names of persons suggested for consideration as new jurors. The clerk performs some duties directed toward securing such names.

• • •

The commission members also secure some names, but on a basis no more regular or formalized than the efforts of the clerk.

• • •

One commissioner testified that he asked for names and that if people didn't give him names he could not submit them.

• • •

The same commissioner considered that Negroes are best able to judge which Negroes are good and outstanding citizens and best qualified for jury service,

that the best place to get information about the Negro citizen is from Negroes. He takes the word of those who recommend people, checks no further and sees no need to check further, considering that he is to rely on the judgment of others. He makes no inquiry or determination whether persons suggested can read or write, although § 21 excludes persons who cannot read English. Neither commissioners nor clerk have any social contacts with Negroes or belong to any of the same organizations. (court's footnotes omitted). (A. 354-356).

The results of these efforts were summarized in the court's opinion.¹ The court also noted the results of the most recent compilation of the jury roll made at a special meeting in January 1967 after the suit was filed and after Alabama's law was changed to permit the service of women on juries.² Census data for these periods were also noted

¹ Composition of Jury Rolls, 1961-66 (Males Only)				
Year	White Males on Jury Rolls	% of 1960 Pop. (white males)	Negro males on Jury Rolls	% of 1960 Pop. (Negro males)
1961	337	43%	16	.7%
1962	348	45%	26	1%
1963	349	45%	28	1%
1964	—	—	—	—
1965	382	49%	47	2%
1966	389	50%	82	4% (A. 359)

² "The January, 1967 meeting of the jury commission increased the number of whites and Negroes, a substantial part of the increase coming from inclusion of females for the first time. Whites on the roll increased to 810, which was 49% of the 1960 census figure for adult white males and females. Negroes on the roll increased to 388, which was 7½% of the 1960 census figure for adult Negro males and females" (A. 360).

in the court's opinion.³ Based on the results of the jury selection process over this period, results which had not substantially improved despite a declaratory judgment requiring more effective administration of the state's juror selection laws to include Negroes (*Coleman v. Barton*, CA 63-4 (N.D. Ala. June 10, 1964)), the court held:

... that Negro citizens of Greene County are discriminatorily excluded from consideration for jury service, in violation of the equal protection clause of the Fourteenth Amendment, and that Tit. 30, § 21 has been unconstitutionally applied as to them. (A. 365)

The relief granted was an injunction against systematic exclusion of Negroes from the jury roll of Greene County, an order requiring that a new jury roll showing the race and, if available, the age of each juror be filed with the court within 60 days and a report showing the procedures used in compiling it (A. 372).

However, the district court rejected appellants' contentions that the statutory criteria contained in Title 30, § 21

³ 1960 Census, Greene County, Persons Over 21 Years of Age				
	White	% White	Negro	% Negro
Male	775	26%	2247	74%
Female	874	24%	2754	76%
Total	1649		5001	(A. 359)

"There was testimony that by 1967, through migration of Negroes, the population ratio for all Negroes and all whites had decreased to 65%-35%. Assuming that this change was reflected in the numbers of adults as in non-adults, and that the number of adult whites remained approximately constant, then the approximate number of adult Negroes in the county (male and female) had declined from 5001 to 3065, of whom approximately 12½% were on the rolls in 1967 after the January special meeting" (A. 360).

were unconstitutionally vague (A. 366, 371) and also denied relief with respect to the racial composition of the jury commission (A. 365, 372).

Summary of Argument

I.

The problem of discrimination against Negroes in jury selection in state courts—one of the oldest known to this Court—persists today largely because of vague statutory criteria which permit white jury officials to use their subjective judgment (and that of others who are also not amenable to law) to decide what Negroes shall be listed for possible jury service. Alabama has such a statute (Code of Alabama, Title 30 § 21 (1958)) and it has been used by white jury officials in Greene County, Alabama with its southern racial traditions to discriminate against Negroes in the county's jury selection process.

In most of the cases in this Court, the constitutionality of these statutes has not been raised or where raised, e.g., *Franklin v. South Carolina*, 218 U.S. 161 (1910), there was no factual record to support the fact of racial exclusion by resort to the vague statutory criteria. That is not so here. In any case, it is doubtful whether *Franklin* and other cases in which the Court assumed the validity of statutes granting discretionary authority to jury officials have any remaining authority in light of this Court's application of the void-for-vagueness doctrine to racial discrimination problems particularly in the voting field, e.g., *Louisiana v. United States*, 380 U.S. 145 (1965). Indeed, the cases in which the doctrine developed demonstrate an appreciation for the deleterious effect on constitutional rights of the use of arbitrary power in official hands and the cases have involved a number of differing factual situations.

Alabama's statute gives its jury officials the "opportunity for discrimination," *Whitus v. Georgia*, 385 U.S. 545, 552 (1967) on many levels but principally empowers them, in the context of racially segregated southern society, to import their assumption of Negro racial inferiority into the process of selecting jurors. The results of the jury selection process in Greene County over a number of years show that the opportunity for discrimination has been resorted to in fact and these results demonstrate a need for a change in law requiring the use of objective criteria for jury selection not merely a change in the procedures by which the present statute is administered, the only relief deemed appropriate by the district court. This conclusion is reinforced by the enormous amount of litigation over the question of racial discrimination in jury selection throughout the state of Alabama showing that the opportunity for racial discrimination provided by the statute has been resorted to by jury officials all over the State.

II.

The excessive discretion granted under Alabama's statute was exercised by all-white jury officials in Greene County and these officials consistently failed to produce a representative cross-section of the county's population of which blacks form a large majority. Uncontroverted proof showed that, during all the years in which the great portion of this Negro majority had been excluded from jury service, the officials involved were white. This fact and the proof of racial discrimination made necessary an injunction requiring the appointment of black jury commissioners in Greene County as a necessary component of relief which would eliminate the discriminatory effects of the past and bar similar discrimination in the future. *Louisiana v. United States, supra*. Appointment of black jury com-

missioners would mean not only official representation of the Negro majority, which would go far toward curing the demonstrated discrimination in jury selection, cf. *Brooks v. Beto*, 366 F.2d 1, 23 (5th Cir. 1966 *en banc*), but would comport with the ideal of a democratic society in which people take part in decisions affecting their own lives. This relief is critical in a community like Greene County in which Negroes have historically been barred from participation in the public life of the community.

ARGUMENT

I.

Alabama's Vague Statutory Standards for Selection of Prospective Jurors, by Vesting Uncontrolled Discretion In Jury Selecting Officials, Permit the Arbitrary Exclusion of Negroes On Racial Grounds In Violation of the Fourteenth Amendment to the Constitution of the United States.

A. Introduction: The Impact Of Vague Statutory Criteria For Jury Selection On The Problem Of Racial Discrimination In Jury Selection.

The problem of racial discrimination in the jury selection process in state courts is an old one. This Court first dealt with it almost 90 years ago in *Strauder v. West Virginia*, 100 U.S. 303 (1880), a case in which the Court held a West Virginia statute excluding members of the Negro race from jury service unconstitutional on its face. *Strauder* and the vast number of cases that have appeared in this Court since then including, recently, *Coleman v. Alabama*, 389 U.S. 22 (1967) (which also arose as does this case from Greene County, Alabama) firmly establish the principle of the illegality of racial exclusion in the state jury selection

process. However, as the long, long line of cases that have appeared in this Court for the past 90 years attest,⁴ this problem is among the most persistent known to our constitutional regime.

The question then arises: why, despite the repeated assertion by this Court as a matter of constitutional law under the Fourteenth Amendment of a rule barring racial exclusion of Negroes as a class from jury service has not

⁴ *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Virginia v. Rives*, 100 U.S. 313 (1880); *Ex Parte Virginia*, 100 U.S. 339 (1880); *Neal v. Delaware*, 103 U.S. 370 (1881); *Bush v. Kentucky*, 107 U.S. 110 (1883); *Wood v. Brush*, 140 U.S. 278 (1891); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Smith v. Mississippi*, 162 U.S. 592 (1896); *Murray v. State of Louisiana*, 163 U.S. 101 (1896); *Carter v. Texas*, 177 U.S. 442 (1900); *Tarrance v. Florida*, 188 U.S. 519 (1903); *Rogers v. Alabama*, 192 U.S. 226 (1904); *Martin v. Texas*, 200 U.S. 316 (1906); *Thomas v. Texas*, 212 U.S. 278 (1909); *Franklin v. South Carolina*, 218 U.S. 161 (1910); *Norris v. Alabama*, 294 U.S. 587 (1935); *Patterson v. Alabama*, 294 U.S. 600 (1935); *Hollins v. Oklahoma*, 295 U.S. 394 (1935) (per curiam); *Hale v. Kentucky*, 303 U.S. 613 (1938) (per curiam); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Smith v. Texas*, 311 U.S. 128 (1940); *Hill v. Texas*, 316 U.S. 400 (1942); *Akins v. Texas*, 325 U.S. 398 (1945); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Brunson v. North Carolina*, 333 U.S. 851 (1948) (per curiam); *Zimmerman v. Maryland*, 336 U.S. 901 (1949) (per curiam); *Cassell v. Texas*, 339 U.S. 282 (1950); *Ross v. Texas*, 341 U.S. 918 (1951) (per curiam); *Brown v. Allen*, 344 U.S. 443 (1953); *Avery v. Georgia*, 345 U.S. 559 (1953); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Williams v. Georgia*, 349 U.S. 375 (1955); *Reece v. Georgia*, 350 U.S. 85 (1955); *Michel v. Louisiana*, 350 U.S. 91 (1955); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Anderson v. Alabama*, 366 U.S. 208 (1961) (per curiam); *Arnold v. North Carolina*, 376 U.S. 773 (1964) (per curiam); *Coleman v. Alabama*, 377 U.S. 129 (1964); *Swain v. Alabama*, 380 U.S. 202 (1965); *Whitus v. Georgia*, 385 U.S. 545 (1967); *Bostick v. South Carolina*, 386 U.S. 479 (1967) (per curiam); *Cobb v. Georgia*, 389 U.S. 12 (1967) (per curiam); *Coleman v. Alabama*, 389 U.S. 22 (1967) (per curiam); *Jones v. Georgia*, 389 U.S. 24 (1967) (per curiam); *Anderson v. Johnson*, 389 U.S. 819 (1967) (per curiam); *Anderson v. Georgia*, 390 U.S. 206 (1968) (per curiam); *Sullivan v. Georgia*, 390 U.S. 410 (1968) (per curiam).

the problem abated?⁵ This case provides the answer.⁶ It challenges what appellants believe is the major cause of the continuing phenomenon of racial exclusion in the jury selection process: state statutory criteria which give to officials responsible for the initial source listing of the names of potential jurors uncontrolled discretion to determine the persons who, in their subjective judgment, are "fit" for jury service.⁷

Statutes such as the one involved in this case and in *Turner*, though not in terms requiring the exclusion of Negroes as did the statute in *Strauder*, *supra*, have been used to effect the identical result (see D. below).

In most of the jury discrimination cases in this Court since *Neal v. Delaware*, 103 U.S. 370 (1881) which held that racial discrimination by officials administering a state statute presumed fair on its face was unconstitutional, the

⁵ The need for congressional legislation to deal with this problem was recognized by former President Johnson by submission of Title II of the proposed Civil Rights Bill of 1966 which dealt with state jury selection procedures. The bill was passed by the House (H.R. 14765, 89th Cong., 2nd Sess. (1966)) but failed to pass in the Senate. Other portions of that bill have subsequently been enacted into law but the section concerning state jury selection has not been passed.

⁶ See also *Turner v. Fouche*, No. 842 (Oct. Term 1968).

⁷ As two recent commentators viewing the problem in its modern setting have put it: "It is this broad discretion located in a non-judicial officer which provides the source of discrimination in the selection of juries." Note: *The Congress, The Court, And Jury Selection: A Critique Of Titles I And II Of The Civil Rights Bill Of 1966*, 52 Va. L. Rev. 1069, 1078 (Oct. 1966); "Certainly in those areas—not all in the South—in which discrimination has existed, criteria which lend themselves to discrimination should not be permitted to withstand the charge that their vagueness is impermissible. At the very least, a history of racial imbalance on juries coupled with the existence of such a ready means for discrimination gives rise to the presumption that the means has been employed." Kuhn, "Jury Discrimination: The Next Phase," 41 So. Cal. Law Rev. 235, 282 (1968).

question of the discriminatory effect of statutory language giving jury selecting officials broad discretion was not raised. A notable exception is *Franklin v. South Carolina*, 218 U.S. 161 (1910) cited by the district court (A. 366) in which this Court sustained a South Carolina statute against an attack identical to the one here made on Alabama's statute, that it conferred arbitrary power upon jury commissioners in selecting jurors. 218 U.S. at 167-68.⁸ But surely

⁸ Two earlier cases, *Gibson v. Mississippi*, 162 U.S. 565, 589 (1896) and *Murray v. Louisiana*, 163 U.S. 101, 108 (1896) cited by the *Franklin* court contained language which gave colorable support to the *Franklin* holding. The statement in *Gibson*, however, was dictum since the issue was whether Mississippi's juror selecting provisions were ex post facto and in *Murray*, the appellant alleged that Louisiana's statute conferred "judicial powers" upon the jury commissioners not that they had exercised discretion in a discriminatory fashion. In any event, in these cases as well as in *Franklin*, the Court was not confronted, as here, with a record showing the discriminatory effect of the application of the statutory standards. Cf. *Williams v. Mississippi*, 170 U.S. 213 (1898) (see part D below).

In later cases, in which the issue also was not raised, this Court has merely assumed without argument or inquiry the continuing validity of statutory provisions granting discretion to jury officials. *Smith v. Texas*, 311 U.S. 128, 130-131 (1940); *Akins v. Texas*, 325 U.S. 398, 402-403 (1945); *Fay v. New York*, 332 U.S. 261, 272 (1947); *Cassell v. Texas*, 339 U.S. 282, 284 (1950); *Hernandez v. Texas*, 347 U.S. 475, 478-79 (1954). All these cases except *Fay* dealt with Texas' system for selecting grand jurors. It is questionable whether, if challenged (as it now has been—*Rodriguez v. Brown*, CA No. 68-206-SA, W.D. Texas (pending before three-judge court)), that system could be sustained today (see concurring opinion of Wisdom, J. in *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966 en banc), part III of the opinion at 28-29). In any event, in both *Smith* ("by reason of the wide discretion permissible in the various steps of the plan, it is . . . capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable," 311 U.S. at 131) and *Akins* ("This method of selection leaves a wide range of choice to the commissioners," 325 U.S. at 403), the Court has recognized that statutes such as that in suit here are capable of being used in a discriminatory way. It is our submission that the problem of discriminatory jury selection will not be solved until that capability is expunged.

in light of the later development by this Court of the vagueness doctrine and its applicability to the problem of racial discrimination in the voting area (see Part B immediately following), such authority as *Franklin* may once have possessed has been eroded.

If there is any lesson apparent from the continual reappearance in this Court of cases alleging racial discrimination in jury selection,⁹ surely it must be that the vast discretion given jury officials by state statutes to select whom they please as prospective jurors has been used to discriminate on racial grounds against Negro citizens. As Judge Kaufman of the Second Circuit told a Senate committee in 1967:

"...long experience with subjective requirements such as 'intelligence' and 'common sense' has demonstrated beyond doubt that these vague terms provide a fertile ground for discrimination and arbitrariness, even when the jury officials act in good faith." Statement of Hon. Irving R. Kaufman, *Hearings on S. 1318 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. at 251 (1967).

Already, Congress, following *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. en banc 1966) which condemned the manner in which federal jury selectors used the key man system has dealt with this problem in the federal courts by passage of the Jury Selection and Service Act of 1968 (P.L. 90-274, 90th Cong., March 27, 1968) which has removed practically all discretion from the hands of federal jury officials.¹⁰ But, as the volume of litigation shows, the

⁹ See note 4 *supra*. In all except a handful of cases, this Court has found discrimination to exist.

¹⁰ The Voting Rights Act of 1965, with its automatic "triggering" formula and ban on state registrars' use of "tests and devices," has

most serious impact of unbridled discretion has been felt in state jury selection, that all-important process on the outcome of which has often depended—and still depends—the very lives of black people in America.

B. The Applicability Of The Void-For-Vagueness Doctrine To Racial Discrimination In Jury Selection.

The unfettered discretion in selecting prospective jurors given Alabama's jury commissioners by Alabama Code, Tit. 30 § 21 is akin to that given state officials in many other situations in which this Court has determined that the exercise of such discretion was unconstitutional because of the opportunity provided for using subjective judgment to make arbitrary or discriminatory decisions affecting important constitutional rights. The too-discretion-giving statute, ordinance, regulation, etc., has usually been voided on vagueness grounds—vague in the sense that the provisions voided were lacking in standards sufficiently definite to guide official action or amounted to no standards at all.¹¹ Courts in other jurisdictions, following this

accomplished the same thing in the voting area. Voting and jury service have been the two areas in which Negro rights have been most severely hampered by the power of local officials exercising discretion (see below n. 14).

¹¹ *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) (economic regulation legislation—"unjust or unreasonable rate" for "necessaries"); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) (economic regulation legislation—"reasonable profit"); *Herndon v. Lowry*, 301 U.S. 242 (1937) (free speech and assembly—"insurrection"); *Hague v. C.I.O.*, 307 U.S. 496 (1939) (granting of parade permit—"riots, disturbances or disorderly assemblage"); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and *Niemotko v. Maryland*, 340 U.S. 268 (1951) [both religious freedom—grant of license]; *Winters v. New York*, 333 U.S. 507 (1948); *Burstyn v. Wilson*, 343 U.S. 495 (1952); *Gelling v. Texas*, 343 U.S. 960 (1952) (per curiam) [all movie censorship]; *Kunz v. New York*, 340 U.S. 290 (1951) (religious freedom); *Staub v. City of Barley*, 355 U.S. 313 (1958) (free expression—administrative licensing); *Shuttlesworth v. City of Birmingham*, No. 42, Oct. Term 1968, 37 U.S.L. Week 4203 (March 10, 1969) (same—parade permit).

Court's lead, have also applied the void-for-vagueness doctrine in several contexts to require ascertainable objective standards for official action.¹² The application of the vagueness doctrine as a remedy for the persistent problem of racial discrimination in jury selection is particularly apt in light of statutes like Alabama's in which the nexus between the vague morality, intelligence, and character standards and significant racial exclusion can be demonstrated. The vice of statutory vagueness is even more insidious where the statute serves as a means for weaving attitudes regarding racial inferiority into the fabric of justice as administered by state courts. "Discriminations against a race by barring or limiting citizens of that race from participation

¹² *Peterson v. Hagan*, 351 P.2d 127 (Wash. 1960) (labor regulations—section of Washington State minimum wage law giving director unlimited power voided for failure to provide standards for promulgation of rules); *Holmes v. New York City Housing Authority*, 398 F.2d 262 (2nd Cir. 1968) (housing administration—held that selection among applicants for public housing must be made in accordance with ascertainable standards: "It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program . . . would be an intolerable invitation to abuse." 398 F.2d at 265); *Soglin v. Kaufman*, 37 U.S.L. Week 2357 (W.D. Wis., Dec. 13, 1968) (student discipline—University of Wisconsin's regulation prohibiting "misconduct" held to violate Fourteenth Amendment due process clause); *Auditorium, Inc. v. Board of Adjustment*, 91 A.2d 528 (Del. 1952), *Cordts v. Hutton Co.*, 146 Misc. 10, 262 NYS 539, aff'd without opinion 266 NY 399 (1932); *Taylor v. Moore*, 303 Pa. 469, 154 A. 799 (1931), *Slattery v. Caldwell*, 83 N.J. Super. 317, 199 A.2d 670 (1964), *Cassell v. Lexington Twp. Board of Zoning Appeals*, 163 Ohio St. 340, 127 N.E.2d 11 (1955) [zoning ordinances held invalid where line of demarcation between areas restricted to different uses insufficiently indicated by ordinance or zoning map]; *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), *Glicker v. Michigan Liquor Control Commission*, 160 F.2d 96 (6th Cir. 1947), *Barnes v. Merritt*, 376 F.2d 8 (5th Cir. 1967) [liquor licensing—denial of liquor license under law devoid of ascertainable standards governing grant or denial unconstitutional].

in jury service are odious to our thought and our Constitution." *Brown v. Allen*, 344 U.S. 443, 470-471 (1953).¹³

In dealing with the problem of racial discrimination in its southern context, this Court has readily perceived the impact of vague statutory criteria on realization of the Negro's constitutional right to vote. "In voting rights . . . as in jury selection, the primary problem has been the vast discretion vested in the local registrar." Note, 52 Va. L. Rev., *supra*, n. 7 at 1141.¹⁴ Appellants here urge the Court to adopt the same approach in this case as it used in cases such as *Louisiana v. United States*, 380 U.S. 145 (1965); *United States v. Mississippi*, 380 U.S. 128 (1965); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam), affirming 81 F. Supp. 872 (S.D. Ala.), in which the Court recognized that local voter registrars in the South were abusing their discretion and, in fact, exercising arbitrary power to refuse to register Negroes to vote. See also *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala.), *aff'd* 304 F.2d 583 (5th Cir. 1962), *aff'd* 371 U.S. 37 (1962) (per curiam). And, in summarizing after passage of the 1965 Voting Rights Act the effect on Negro voting of tests used by local registrars, this Court commented in *South Carolina v. Katzenbach*, 383 U.S. 301, 312-13 (1966): "The good morals requirement is

¹³ It obviously makes no difference whether the forbidden racial discrimination is accomplished by the statute's explicit terms or language sufficiently elastic to permit officials to discriminate. *Louisiana v. United States*, 380 U.S. 145 (1965).

¹⁴ As the same commentator has put it:

Voting and jury service are the two most common instances of direct citizen participation in government. The most deeply rooted problems in both areas stem from the alienation of the Negro from the general affairs of the community, particularly in the South. 52 Va. L. Rev. at 1140.

The alienation has largely been accomplished by the use of excessive discretion in the hands of white officials.

so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials." More recently, in *Hadnott v. Amos*, this Court again reinforced the position of these earlier cases:

We deal here with Fifteenth Amendment rights which guarantee the right of people regardless of their color or political persuasion to cast their votes effectively and with First Amendment rights which include the right to band together for the advancement of political beliefs. *Williams v. Rhodes*, 393 U.S. 23. While the regulation of corrupt practices in state and federal elections is an important governmental function, we refuse to accept a reading of an Act which gives such a loose meaning to words and such discretionary authority to election officials as to cause Fifteenth and First Amendment rights to be subject to disparate treatment. No. 647 Oct. Term 1968, 37 U.S. Law Week 4256, 4257 (March 25, 1969).

The method of using tests requiring the ability to understand and interpret sections of the federal and state constitution as a precondition of voting differs little from that of official use of standards such as whether a person is "generally reputed to be honest and intelligent . . . and . . . esteemed in the community for . . . integrity, good character, and sound judgment." The Fifth Circuit, with its particularly clear perspective in the matter of racial discrimination, has long recognized the relation between jury selection and voting rights. *United States, ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir. 1959); *United States v. Mississippi*, 339 F.2d 679, 681 (5th Cir. 1964); *United States v. Duke*, 332 F.2d 759, 763 (5th Cir. 1964) and has also required that voting registrars adopt uniform objective standards in applying statutory tests to Negro applicants,

United States v. Atkins, 323 F.2d 733 (5th Cir. 1963). And, recognizing the potential for racial discrimination, that court has adopted a similar approach in the area of the admission of blacks to public schools and state-supported colleges and universities. *Board of Supervisors v. Ludley*, 252 F.2d 372 (5th Cir. 1958), (statute requiring certificate of "good moral character" invalid); *Orleans Parish School Board v. Bush*, 242 F.2d 156 (5th Cir. 1957) (pupil assignment statute held to contain no ascertainable standards to guide discretion).

These cases recognize that in "the reality of . . . the segregated world," *Brooks v. Beto*, 366 F.2d 1, 12 (5th Cir. 1956), southern white officials having the power at their disposal to limit the participation of Negroes in the public affairs of the community have seized the "opportunity for discrimination," *Whitus v. Georgia*, 385 U.S. 545, 552 (1967), presented by standards for jury selection such as those involved in this case.

C. The Opportunity For Racial Discrimination Presented By Alabama's Statute.

Even if the "reality of the segregated world" with white racial attitudes of Negro inferiority could be ignored, the vague criteria of Alabama's statute are constitutionally objectionable on other grounds, e.g., standards such as these permit discrimination on a variety of nonracial bases, economic, religious, associational (officials administering such a statute can select only their friends or the friends of friends) and even if the administration of the statute were totally in the hands of black men (see Argument II below) it is conceivable that black officials given the same opportunity for exercising subjective judgment, could similarly discriminate on these and other grounds not only against whites (and this is certainly true in Greene County

where blacks are a majority) but also among other Negroes whose participation in jury service was unwanted.¹⁵

However, the reality of the segregated world cannot be ignored; this case involves the typical situation of white men discriminating against black men and women because the State's statute has made it possible for them to do so. It has made it possible for them in several ways. *First*, it is possible for each jury commissioner to have different standards for determining what persons are "honest and intelligent" and have "integrity, good character and sound judgment." Cf. *Pullum v. Greene*, 396 F.2d 251, 255 (5th Cir. 1968). *Second*, the statute provides the opportunity not only for each commissioner to act on his prejudices but on his ignorance as well. Cf. *Hill v. Texas*, 316 U.S. 400, 404:

Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case discrimination necessarily results where there are qualified negroes available for jury service.

and *Cassell v. Texas*, 339 U.S. 282, 289 (1950);

"When the commissioners were appointed judicial administrative officials, it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race or color. They did not do so here, and the result has been racial discrimination." (see part D below)

¹⁵ Appellant's firm position is that whoever is responsible for the initial selection of prospective jurors must be guided by objective standards.

Third, Alabama's statute makes it possible for the jury commissioners to operate on their feeling of racial inferiority of Negroes since the statute directs the commissioners to select only those persons "generally reputed to be honest and intelligent, . . . and . . . esteemed in the community for their integrity, good character and sound judgment." Given the racial traditions of Greene County Alabama,¹⁶ few black men and women, to the commissioners' way of thinking, would be able to meet these standards.¹⁷ As the Fourth Circuit recently said in *Witcher v. Peyton*, 405 F.2d 725, 727:

"Although innocuous on its face, the purpose of both judge and jury commissioners to include only 'the best qualified people' and their disinclination to put persons on at random meant inevitably that the venires would be heavily weighted in favor of white people and against the inclusion of qualified Negroes. It should not surprise anyone that an all-white jury commission guided by a white judge would be unlikely to find as high a proportion of the Negro community to be 'best qualified' as found among white people. It is a simple truth of human nature that we usually find the 'best' people in our own image, including, unfortunately, our own pigmentation."

Fourth, the statute further enables white jury commissioners in a county such as Greene in which blacks outnumber whites by 2-1 to act on their fears of a black "take-

¹⁶ Cf. *Eubanks v. Louisiana*, 356 U.S. 584, 588 (1958):
[Negro service on juries was] "controlled by a tradition and the general thinking of the community as a whole [was] under the influence of that tradition."

¹⁷ One commissioner's comments were typical: "We were born and raised with *these people* and we have done all we know how and treated them right" (A. 58). (Emphasis supplied.)

over," to reinforce their historically nurtured persuasion that white people must maintain control of the community's official life. Cf. *Gray v. Main*, CA 2430-N (M.D. Ala., March 29, 1968) (not yet reported) in which an Alabama district judge, considering a challenge to voting procedures in connection with the 1966 Alabama primary election in which a substantial number of Negroes voted for the first time commented:

The three counties, Macon, Bullock, and Barbour, have heavy Negro populations. Macon and Bullock have more adult Negroes (1960 census) than whites. Since Reconstruction days there were no elected Negro office holders in these counties until the early 1960's.

. . .

As for the defendants and the white population of Bullock County, the transition from dominant political control of their elected officials to the prospect of sharing or losing this control to the Negro population, with a great number of those registered being illiterate and untrained, was undoubtedly a searing emotional experience. (Slip opinion pp. 40, 41)

Fifth, and as a corollary to the point previously made, the Alabama jury selection statute empowers the jury commissioners to select only those Negroes (when they select them at all) deemed to be "safe," cf. *Brooks v. Beto*, 366 F.2d 1, 27 (5th Cir. 1966) (concurring opinion of Judge Wisdom); to reject a Negro thought "uppity" (as for example one who tried to register to vote or engaged in a protest demonstration). Cf. Kuhn, *op. cit.* n. 7 at 271 (1968). In this last aspect the opportunity to discriminate on racial grounds in jury selection tends to impair other constitutional rights, i.e., the right to vote and the right to free

expression by making their exercise costly. Cf. *Griffin v. California*, 380 U.S. 609, 614 (1965).

Thus, in all these ways the State of Alabama has given its jury officials the opportunity for racial discrimination condemned in *Whitus v. Georgia*, *supra*. Moreover, these opportunities to discriminate occur after the commissioners have first exercised the discretion—also given them by the statute—to select from among the various sources to which the statute directs the commissioners for securing the names of the prospective jurors. See note, 52 Va. L. Rev. at 1079.¹⁸ Thus, the Alabama statute has provided the opportunity to discriminate on many levels and it is clear that in this case that opportunity has been resorted to.

D. The Opportunity For Racial Discrimination Provided By Alabama's Statute Has Been Resorted To.

Though, for the reasons stated above in part C, a statute furnishing the opportunity for abuse of the excessive discretion granted is void no matter who the officials are administering it, (the protection of constitutional rights ought not to depend on the cast of the die which determines what individuals will at any given moment be invested with the responsibility for jury selection),¹⁹ nevertheless a record

¹⁸ In *Fikes v. Alabama*, 263 Ala. 89, 81 So.2d 303, 309 (1955), *rev'd* on other grounds, 352 U.S. 191 (1957), the Alabama Supreme Court held that the statutory direction to include the names of all eligible persons on the jury roll did not mean literally that every qualified person's name must appear on the roll or in the jury box. Obviously, this means that all the sources of names mentioned in the statute need not be consulted. In this case, all sources were not in fact consulted (A. 355).

¹⁹ "... if the law does not provide an appropriate definition of and limitation upon the exercise of discretion by a governmental agency, the grant of power is void." "The Congress, The Court and Jury Selection, etc.," *supra* n. 7 at 1146 citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369-70 (1886).

which clearly discloses that the threatened abuse has actually occurred (cf. *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Louisiana v. United States*, *supra*) demonstrates beyond question the degree to which the constitutional right of non-discrimination in jury selection is vitiated by statutory vagueness. Such is the record in this case, a record that leaves no doubt that the all-white jury commissioners in Greene County used their discretion to exclude the county's black citizens.

The three-judge district court found as a fact that the three jury commissioners and the clerk did not obtain or even attempt to obtain the name of every person in the county who was potentially eligible for jury duty as required by law²⁰ (A. 354). In other respects, the degree of dedication to the task of securing juror names manifested by these officials was less than remarkable. Thus, as the court found: (1) not all of the sources of names to which the Alabama Code directs jury-selecting officials were consulted (A. 355), a fact which, as noted above, combined with the qualification standards to produce the resulting discrimination; (2) that neither the commission members nor the clerk attempted to secure names on any regular or formalized basis (A. 355); (3) that the commissioners just "ask[ed] around" in the counties where they lived and secured names chiefly from whites (*ibid.*); (4) another commissioner asked for names and if people didn't give him any he didn't submit any (A. 356); (5) the same commissioner took the word of persons who recommended people and saw no need to check further (*ibid.*); (6) none of the commissioners or the clerk had any social contacts with Negroes or belonged to any of the same organizations (*ibid.*).

²⁰ Code of Alabama, Tit. 30, § 24. But see *Fikes v. Alabama*, *supra*, n. 18.

Appellants submit that these findings were less a consequence of the demonstrated lack of energy on the commissioners' part than a consequence in combination of (1) a long-standing and customary *modus operandi* on the part of the jury officials; (2) a way of life (part of "the reality of the segregated world") that kept knowledge of Negro names except those who had been "in trouble" (A. 355) away from the jury officials, and (3) a system of statutory selection which enabled the community customs and way of life to take effect through the exclusion of Negroes from the jury roll. These findings are amply supported by the record (A. 36, 115, 236, 116, 234).

When the results of the system set in motion by the statute are examined, the real meaning of the effect of the vague statutory criteria is exposed. Thus, up to 1964, the date of *Coleman v. Barton* in which a single district judge entered a declaratory judgment, the largest number of Negroes whose names appeared on the jury roll was 28 or 1% of the eligibles (A. 75, 360). After 1964, notwithstanding the entry of the declaratory judgment, the number had risen only to 82, or 4% of the eligibles, by 1966 when Alabama changed its statute to permit female service (A. 360). This paltry number of Negro names was on the jury roll after the yearly meeting of the commission in August 1966 despite the fact, as the court found, that at that meeting the county's voter list which contained the names of approximately 2,000 Negroes was scanned (A. 357)! This fact led the court to comment:

Thus in practice, through the August, 1966 meeting the system operated exactly in reverse from what the state statutes contemplate. It produced a small group of individually selected or recommended names for consideration. Those potentially qualified but whose

names were never focused upon were given no consideration. (A. 357).

But the court was wrong in concluding that the system operated "in reverse" of what the state statute contemplated. It was the statute which afforded to the commissioners the means for keeping the number of Negroes on the jury roll so small.

After the extraordinary session of the jury commissioners in January 1967 (which was held after this suit was filed), the percentage of Negroes on the jury roll was increased from .7% in 1961 to 32% (A. 361), but it is to be noted that during the period that this increase occurred this Court twice considered a challenge to the jury selection procedures in Greene County (*Coleman v. Alabama*, 377 U.S. 129 (1964); *Coleman v. Alabama*, 389 U.S. 22 (1967)), the district court entered a declaratory judgment in a case presenting the same challenge, *Coleman v. Barton*, CA 63-4 (N.D. Ala. June 10, 1964), and the district court again considered a challenge to Greene County jury selection procedures which resulted in the order appealed from here. At the same time, a considerable amount of civil rights activity occurred in the county (A. 287) and an action was heard in the federal district court challenging voting practices and procedures on racial grounds (A. 287-88).²¹ Notwithstanding this considerable judicial and other action, as of the time this case was heard and decided below, the jury commissioners in a county 65% black had amassed a jury roll that was only 32% black (A. 361) or only 12½% of the adult Negroes of the county (A. 360).

²¹ *Gilmore v. Greene County Democratic Party Executive Committee*, C.A. No. 66-341 (N.D., Ala.) (Opinion filed Feb. 11, 1969).

Surely the results demonstrated on this record cannot be said to be the consequence only of improper procedures by the jury officials for securing names. Beyond the need for a change in procedure is a need for a change in law requiring the use of standards "objectively applicable and objectively applied," Note, 52 Va. L. Rev., *supra*, at 1151, which will insure that no set of jury commissioners will be capable of limiting the opportunity for Negro service on juries by use of subjective criteria.

E. The Opportunity To Discriminate Provided By Alabama's Statute Has Been Resorted To Throughout The State.

Appellants' basic submission here is that because of the vague statutory criteria of Title 30 § 21 officials responsible for selecting jurors throughout the state of Alabama, not only in Greene County, have been given the opportunity to exclude substantial numbers of Alabama's eligible black citizens from jury service. Since, as we have shown, the practice of racial exclusion from jury service is made possible principally because of the statute's lack of objective standards, the failure to correct *this* situation has left the promise of constitutional equality unfulfilled. The vast number of cases, past and present, which have challenged racial exclusion in Alabama's jury selection process in this Court, the lower federal courts and the Alabama state courts are the consequence of this failure.

Alabama's courts have demonstrated a clear unwillingness to limit administrative discretion in the application of the State's jury selection statutes.²² Indeed, in none of

²² Characteristic is the judicial attitude embodied in an old Alabama jury selection opinion:

The matter of selection or rejection is left to the opinion (judgment) of the officers charged with the duty. Who is to review this, or pronounce upon their motives? If their opinion

the cases which have reached the Alabama Supreme Court²³ has that court ever sustained the claim of racial discrimination in the selection process. Thus, many of these cases have found their way to this Court.²⁴

In the lower federal courts, the failure to deal with the problem of excessive discretion in the hands of Alabama jury officials has occasioned an overwhelming amount of litigation involving racial discrimination in jury selection.²⁵

or judgment is to control them, how can their conduct, in the absence of their discretion, and fraud, become the subject of review? *Green v. State*, 73 Ala. 26, 40 (1882).

and, in a later opinion:

"The commission was thus in the exercise of official discretion, wide in its scope, and not even to be superseded by that of the trial judge . . ." *Norris v. State*, 156 So. 556 at 561 (1934).

²³ See *Norris v. State*, 229 Ala. 226, 156 So. 556 (1934) (Jackson County); *Millhouse v. State*, 232 Ala. 567, 168 So. 665 (1936) (Mobile County); *Vaughn v. State*, 235 Ala. 80, 177 So. 553 (1937) (Mobile County); *Powell v. State*, 224 Ala. 540, 141 So. 201 (1937) (Jackson County); *Vernon v. State*, 245 Ala. 633, 18 So.2d 388 (1944) (Jefferson County); *Fikes v. State*, 263 Ala. 89, 81 So.2d 303 (1955) (Dallas County); *Reeves v. State of Alabama*, 264 Ala. 476, 88 So.2d 561 (1956) (Montgomery County); *Anderson v. State*, 270 Ala. 575, 120 So.2d 397 (1959) (Dallas County); *Swain v. State*, 275 Ala. 508, 156 So.2d 368 (1963) (Talladega County); *Coleman v. Alabama*, 280 Ala. 509, 195 So.2d 800 (1967) (Greene County); *Seals v. State of Alabama*, 213 So.2d 645 (1968) (Mobile County); *Taylor v. State*, 213 So.2d 836 (1968) (Talladega County).

²⁴ See *Rogers v. Alabama*, 192 U.S. 226 (1904); *Norris v. Alabama*, 294 U.S. 587 (1934); *Anderson v. Alabama*, 366 U.S. 208 (1961); *Coleman v. Alabama*, 377 U.S. 129 (1964); *Swain v. Alabama*, 380 U.S. 202 (1965); *Coleman v. Alabama*, 389 U.S. 22 (1967).

²⁵ Civil suits successfully challenging racially discriminatory jury selection have been brought in federal district courts in counties throughout the state of Alabama. See, e.g., *Mitchell v. Johnson*, 250 F. Supp. 117 (M.D. Ala. 1966) (Macon County); *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (Lowndes County); *Turner v. Spencer*, 261 F. Supp. 542 (S.D. Ala. 1966) (consolidated

Despite the vast amount of litigation and the recognition by at least one district judge of this defect in Alabama's statutory scheme:

... The chief difference lies in the latitude of responsibility which is given to the jury commissioners in the application of the "subjective" standards required by Alabama law. The jury commission shall place on the jury roll "the names of all citizens of the county who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character, and sound judgment." Title 30, Sec.

from cases which arose in Perry, Hale and Wilcox Counties); *Banks, et al. v. Holley*, CA 735-E (M.D. Ala. 1967) (Tallapoosa County); *Dennard, et al. v. Baker*, CA 2654-N (M.D. Ala. 1968) (Barbour County); *Hadnott, et al. v. Narramore*, CA 2681-N (M.D. Ala. 1968) (Autauga County); *McNab, et al. v. Griswold*, CA 2653 (M.D. Ala. 1968) (Bullock County); *Palmer, et al. v. Steindorff*, CA 2679-N (M.D. Ala. 1968) (Butler County); *Bush, et al. v. Woolf*, CA 68-206 (N.D. Ala. 1968) (Calhoun County); *Good, et al. v. Slaughter*, CA 2677-N (M.D. Ala. 1968) (Crenshaw County); *Reese v. Pickering*, CA 3839-65 (S.D. Ala. 1968) (Dallas County); *Croddock v. Bedsole*, CA 940-S (M.D. Ala. 1968) (Henry County); *Sumbry v. Williams*, CA 763-E (M.D. Ala. 1968) (Russell County).

Similar cases have been initiated and are pending in the following counties: *Huff, et al. v. White*, CA 68-223-N (M.D. Ala.) (Bibb County); *Palmer, et al. v. Davis*, CA 967-S (M.D. Ala.) (Dale County); *Jones, et al. v. Holliman*, CA 3944-65 (S.D. Ala.) (Marengo County); *Preston, et al. v. Mandeville*, CA 5059-68 (S.D. Ala.) (Mobile County); *Richardson, et al. v. Wilson*, CA 68-300 (N.D. Ala.) (Jefferson County); *Jones, et al. v. Wilson*, CA 66-92 (N.D. Ala.) (Jefferson County), pending on appeal *sub nom. Salary v. Wilson*, No. 25978 (5th Cir.); *Black v. Coxwell*, CA 5025-68-P (S.D. Ala.) (Monroe County); *Lockett v. Chappell*, CA 68-768 (N.D. Ala.) (Pickens County); *Mallisham v. Kyle*, CA 69-85 (N.D. Ala.) (Tuscaloosa County); *Nobels v. Waid*, CA 68-618-M (N.D. Ala.) (St. Clair County); *Nixon v. Parker*, CA 65-619 (N.D. Ala.) (Sumter County).

Cases in the court of appeals are: *United States ex rel. Seals v. Wiman*, 304 F.2d 53 (5th Cir. 1962); *Billingsley v. Clayton*, 356 F.2d 13 (5th Cir. 1966 en banc); *Giles v. Alabama*, 384 F.2d 383 (5th Cir. 1967).

21, Code of Alabama, (as amended by Act No. 285, Special Session 1966). *Obviously, there is room for arbitrary refusal to include certain names in the jury box under the guise of enforcement of the above-quoted provision. Rather than strip all such responsibility from the jury commissioners, this court will admonish the defendant commissioners that it stands ready to take such action, if the responsibility and trust herein reposed is abused. Turner v. Spencer, 261 F. Supp. 542, 543-44 (S.D. Ala. 1966). (emphasis supplied)*

the lower federal courts have also not come to grips with the problem. This Court should do so now.

II.

The Appointment of Only White Jury Commissioners Who Exercise the Excessive Discretion Granted Under Alabama Law Violates the Fourteenth Amendment to the Constitution of the United States.

The evidence supporting the fact of continued exclusion on racial grounds of black people (who are the majority in Greene County) is abundant and fully supports the district court's finding of racial discrimination (see Argument ID supra). The county's jury commissioners had consistently failed to produce anything approaching a representative cross-section of the population on the county's jury rolls thereby violating the black majority's constitutional right to participate through jury service in decisions affecting their lives, liberty, and economic interests.

During the years for which there was evidence in the record of the results of the jury selection process in Greene County, racial exclusion of most of the county's black eligibles was accomplished by white jury commissioners

who were applying Alabama's vague statutory standards to the few—very few—Negroes who were even considered at all. Not a single black man during this period was appointed as a jury commissioner; the jury commission's clerk was white and this was the situation for at least as long as the jury clerk had served in that capacity, some twelve years (A. 32). The district court stating that "[t]he attack on racial composition of the commission fails for want of proof" (A. 365) nevertheless found "the commission in Greene County now is and for many years has been composed entirely of white men appointed by the governor" (A. 365-66).

In light of this finding by the district court, it is difficult to know the significance of the court's statement that the attack on the racial composition of the jury commission failed "for want of proof." Certainly, there was more than ample proof, as the court found, that the white jury commissioners had for many years excluded most Negroes from the opportunity for jury service—the opportunity to participate in "the most important stage of the system—final fact-finding by a trial jury," *Labat v. Bennett*, 365 F.2d 698, 716 (5th Cir. 1966)—and it is obvious that this was accomplished in large measure by the unfettered discretion made possible by Alabama's statute (Argument I *supra*). When the interlocking effect on Negro jury service of unbridled discretion in the hands of white men to select potential jurors on the basis of their subjective judgment in a community with the racial traditions of Greene County is considered, it is obvious that the "proof" before the district court was more than sufficient to compel an injunction requiring the appointment of blacks to the jury commission. As this Court said in *Louisiana v. United States*, 380 U.S. 145 (1965): "the court [had] not merely the power but the duty to render a decree which [would] so far as

possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 380 U.S. at 154. Surely, the remedy of requiring the appointment of black people as jury commissioners was within the court's power (the state's governor was a defendant) and consideration of all the relevant circumstances (the circumstance (1) that the white jury officials—consistent with southern racial patterns—had little, if any, contacts with Negroes and, therefore; (2) that the officials knew very few Negroes and practically nothing about the black community; (3) that only a few Negroes were contacted to secure black names for jury listing (A. 335); (4) that, in applying the statutorily created subjective standards, the white jury officials relied not only on their own subjective judgments but, even worse, on the subjective judgments of other people (A. 356); and (5) that, as previously pointed out (Argument IC above), few Negroes could be expected to pass muster under these standards as applied by white southern officials and few in fact did) mandated this relief.

Manifestly, in order to correct the effects of past discrimination and to prevent its recurrence—relief going beyond the mere direction to white officials to "do better" in the future was needed. The admonition to "improve" the situation re: black jury service in Greene County had already been given in 1964 (*Coleman v. Barton supra*) but had not been heeded. An important component of this relief—in addition to enjoining the use of the statutory standards—was an order requiring the appointment of black jury officials in Greene County who would represent the majority black community in Greene County. Cf. *Brooks v. Beto*, 366 F.2d 1, 23;

"To fairly represent the community, there must be an awareness of the make-up of that community."

"There are, of course, a variety of ways of going about this. *One, obviously is fairly to place on the juror-selecting body persons from or closely identifiable with such groups*" (emphasis supplied)

This "obvious" remedy rejected by the district court is crucial in Greene County, Alabama where 2 out of every 3 persons are black.²⁶

Finally, there is an equally compelling reason why the appointment of Negroes as jury commissioners in Greene County is important: to arrest "the alienation of the Negro from the general affairs of the community, particularly in the South." (See note 14 *supra* at p. 20.) That alienation has been well documented as it relates to participation in the political processes of the South (*Political Participation*, Report of the United States Commission on Civil Rights, 1968). Participation—in an official way—in the closely related process of selecting those who will serve on juries is essential not only because of the importance to the administration of justice as it affects 2 out of every 3 persons in Greene County, but also to assure black people in this deep South county that the

²⁶ As Chief Judge Brown of the Fifth Circuit also stated in *Brooks v. Beto*:

The challenge is to assure constitutional equality now. This often means, as it did in this case, eradication of the evils of the past. That evil of racial exclusion cannot be ignored. It must be reckoned with in terms which permit, indeed assure, equality for the immediate future. The evil and the evil practices are not theoretical. They are realities. The law's response must therefore be realistic.

Thus the solution to this problem, as in many other aspects of civil rights, comes from experience born of the rich history of the struggles of the past decade. This Court has not hesitated to fashion judicial remedies to the realities to assure actual enjoyment of the constitutional ideals. 366 F.2d at 24.

democratic ideal of citizen involvement in matters touching their lives has meaning for *them*; it clearly has had little meaning for them in the past.²⁷ But the consistently clear message of this Court's numerous decisions in the voting field has been that the Reconstruction amendments were designed to assure full participation of Negroes in the governmental process. See, e.g., *Terry v. Adams*, 345 U.S. 461, 466 (1953):

. . . no election machinery could be sustained if its purpose or effect was to deny Negroes on account of their race *an effective voice* in the governmental affairs of their country, state, or community. (emphasis supplied)

This unexceptionable proposition was recently reaffirmed by this Court with respect to Greene County. *Hadnott v. Amos*, Nos. 647, Oct. Term 1968, 37 U.S.L. Week 4256 (March 25, 1969). The principle is equally applicable to the service of Negroes as jury selectors.

²⁷ With 74% of the adult population by 1960 census figures (A. 359), Negroes in Greene County had been effectively shut off from participation in the political processes there until after passage of the Voting Rights Act of 1965. Federal registrars were required in order to secure any substantial Negro voting registration (A. 358).

CONCLUSION

WHEREFORE, that portion of the district court's judgment declining to hold Code of Alabama, Title 30 § 21 unconstitutional on its face and to enjoin enforcement of its vague criteria should be reversed and the court directed to enter declaratory and injunctive relief as prayed in the complaint. The relief granted should require the use of only objective criteria in the future selection of jurors. That portion of the district court's judgment refusing to declare the all-white composition of the Greene County Jury Commission unconstitutional should also be reversed and the appointment of black jury commissioners required.

Respectfully submitted,

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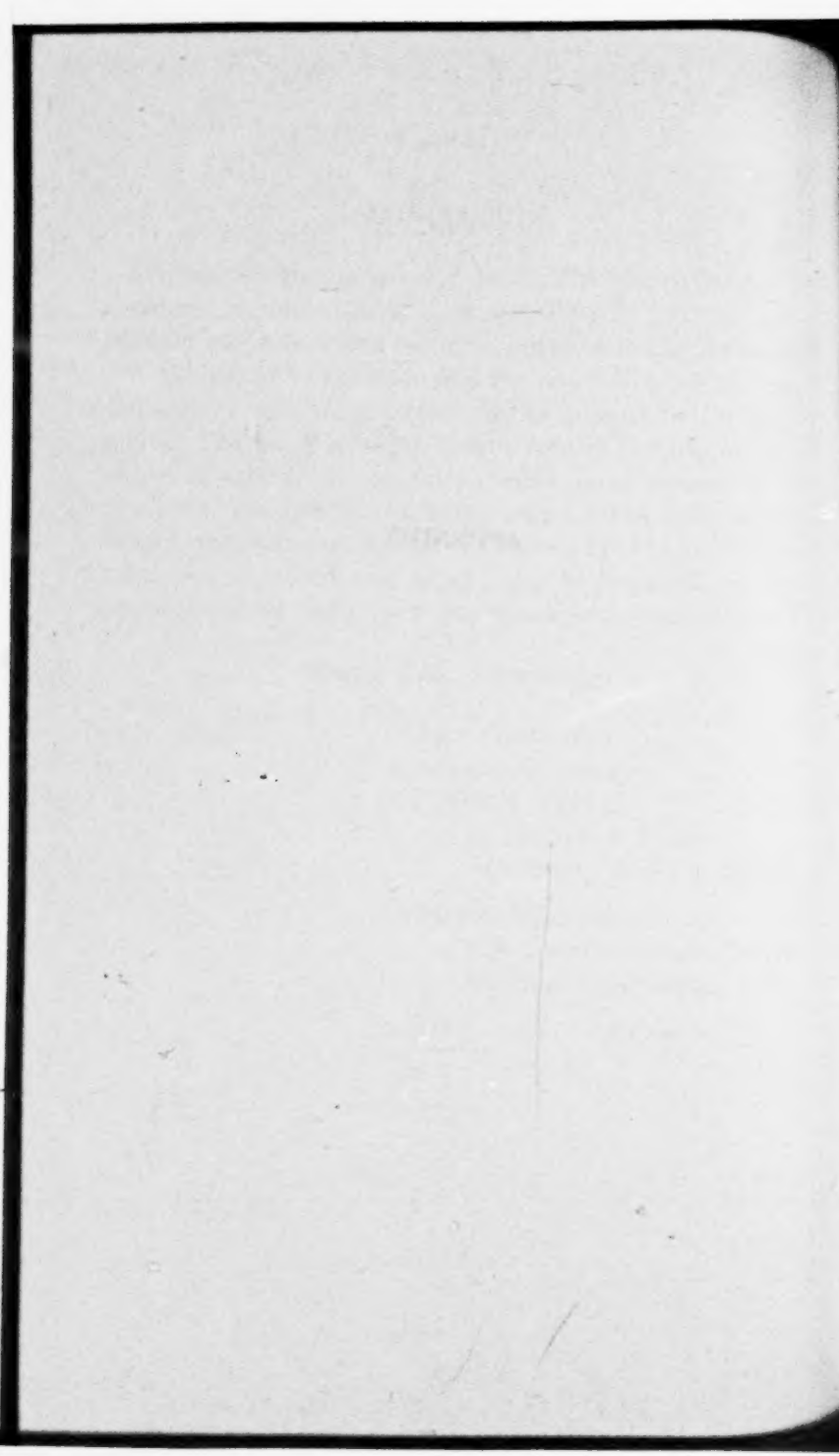
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APPENDIX



APPENDIX

Statutory Provisions Involved

The following additional provisions are material to an understanding of the issues presented.

Code of Alabama, Tit. 30, § 9. Membership, etc., of commissions.—Each of said jury commissions shall be composed of three members who shall be qualified electors of the county in which they are appointed and shall be persons reputed for their fairness, impartiality, integrity and good judgment. Members of the commission shall not during the term for which they are appointed and during their tenure in said office hold any other office by appointment or election or perform any other public duty under the federal, state, county or municipal government, which carries with it any compensation whatsoever. (1939, p. 86; 1966, Ex. Sess., p. 428, § 1, appvd. Sept. 12, 1966.)

Code of Alabama, Tit. 30, § 10. Members to be appointed by governor.—The governor shall appoint the members of the several jury commissions who shall constitute said several commissions during the governor's tenure of office and until their successors are appointed and qualified, and thereafter the governor shall appoint the members of said jury commissions for and only during the tenure of office of the governor making the appointment and until their successors are appointed and qualified. (1939, p. 86.)

Code of Alabama, Tit. 30, § 18. Duties of Clerk.—The clerk of the jury commission shall, under the direction of the jury commission obtain the name of every citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence and place of business, and shall perform all such other duties required

Statutory Provisions Involved

of him by law under the direction of the jury commission. (1939, p. 86; 1966, Ex. Sess., p. 428, § 2, appvd. Sept. 12, 1966.)

Code of Alabama, Tit. 30, § 20. Jury roll and cards.—The jury commission shall meet in the court house at the county seat of the several counties annually, between the first day of August and the twentieth day of December, and shall make in a well-bound book a roll containing the name of every male citizen living in the county who possessed the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the jury commission shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business on each card. These cards shall be placed in a substantial metal box provided with a lock and two keys, which box shall be kept in a safe or vault in the office of the probate judge, and if there be none in that office, the jury commission shall deposit it in any safe or vault in the court house to be designated on the minutes of the commission; and one of said keys thereof shall be kept by the president of the jury commission. The other of said keys shall be kept by a judge of a court of record having juries, other than the probate or circuit court, and in counties having no such court then by the judge of the circuit court, for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept securely and for the use of the jury commission exclusively. It shall not be inspected by anyone except the members of the commission or by the clerk of the commission upon the authority of the commission, unless upon an order of the judge of the circuit court or other court

Statutory Provisions Involved

of record having jurisdiction. (1939, p. 86; 1945, p. 496, appvd. July 7, 1945; 1966, Ex. Sess., p. 428, § 3, appvd. Sept. 12, 1966.)

Code of Alabama, Tit. 30, § 24. Duty of commission to fill jury roll; procedure; etc.—The jury commission is charged with the duty of seeing that the name of every person possessing the qualifications prescribed in this chapter to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box. The jury commission must not allow initials only to be used for a juror's name but one full Christian name or given name shall in every case be used and in case there are two or more persons of the same or similar name, the name by which he is commonly distinguished from the other persons of the same or similar name shall also be entered as well as his true name. The jury commission shall require the clerk of the commission to scan the registration lists, the lists returned to the tax assessor, any city directories, telephone directories and any and every other source of information from which he may obtain information, and to visit every precinct at least once a year to enable the jury commission to properly perform the duties required of it by this chapter. In counties having a population of more than one hundred and eighteen thousand and less than three hundred thousand, according to the last or any subsequent federal census, the clerk of the jury commission shall be allowed an amount not to exceed fifty dollars per calendar year to defray his expenses in the visiting of these precincts, said sum or so much thereof as is necessary to be paid out of the respective county treasury upon the order of the president of the jury commission. (1939, p. 86.)

Statutory Provisions Involved

Code of Alabama, Tit. 30, § 30. Drawing grand and petit juries from jury box.—At any session of a court requiring jurors for the next session, the judge, or where there are more than one, then any one of the judges of the court shall draw from the jury box in open court the names of not less than fifty persons to supply the grand jury for such session and petit juries for the first week of such session of the court, or if a grand jury is not needed for the session at least thirty persons, and as many more persons as may be needed for jury service in courts having more than one division for the first week, and after each name is drawn it shall not be returned to the jury box, and there shall be no selection of names, and must seal up the names thus drawn, and retain possession thereof, without disclosing who are drawn until twenty days before the first day of the session of the court for which the jurors are to serve, when he shall forward these names by mail or express, or hand the same to the clerk of the court who shall thereupon open the package, make a list of the names drawn, showing the day on which the jurors shall appear and in what court they shall serve, and entering opposite every name the occupation of the person, his place of business, and of residence, and issue a venire containing said names and information to the sheriff who shall forthwith summon the persons names thereon to appear and serve as jurors. (1909, p. 305.)

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In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. ~~800~~ 30

WILLIE CARTER, SR., JOHN HEAD,
PERCY McSHAN,

APPELLANTS

versus

JURY COMMISSION OF GREENE
COUNTY, ALABAMA, et al.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF AND ARGUMENT OF APPELLEES

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In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. _____

WILLIE CARTER, SR., JOHN HEAD,
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APPELLANTS

versus

JURY COMMISSION OF GREENE
COUNTY, ALABAMA, et al.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF AND ARGUMENT OF APPELLEES

QUESTIONS PRESENTED

I

WHETHER TITLE 30 SECTION 21 OF THE CODE OF ALABAMA AS AMENDED IS UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE *FOURTEENTH* AMENDMENT IN ITS PROVISION THAT "THE JURY COMMISSION SHALL PLACE ON THE JURY ROLL AND IN THE JURY BOX THE NAMES OF *ALL* CITIZENS OF THE COUNTY WHO ARE GENERALLY REPUTED TO

BE HONEST AND INTELLIGENT AND ARE ESTEEMED IN THE COMMUNITY FOR THEIR INTEGRITY, GOOD CHARACTER AND SOUND JUDGMENT" BECAUSE SUCH PROVISION PROVIDES ALABAMA JURY OFFICIALS WITH THE OPPORTUNITY TO DISCRIMINATE ON RACIAL AS WELL AS OTHER GROUNDS.

II

WHETHER THE JURY COMMISSION OF GREENE COUNTY, ALABAMA WAS UNCONSTITUTIONALLY CONSTITUTED WHERE THERE WAS A COMPLETE ABSENCE OF EVIDENCE THAT THERE HAD BEEN DISCRIMINATION IN THE SELECTION OF THE COMMISSIONERS.

STATEMENT OF THE CASE

Although the Appellants have fairly accurately given the Court a short hand rendition of the chronology of the case, Appellees would like to add thereto the following:

The District Court, in its opinion, found, as a fact, the following:

"At the August, 1966 meeting one commissioner was new and submitted no names, white or Negro, and merely did clerical work at the meeting. Another had been ill and able to seek names little if at all. The third could remember one Negro name that he suggested. * * *

"Thus in practice, through the August, 1966 meeting the system operated exactly in reverse from what the state statutes contemplate. It produced a small group of individually selected or recommended names for considera-

tion. Those potenetially qualified but whose names were never focused upon were given no consideration. * * *

* * * * *

"In January, 1967, after this suit was filed, an extraordinary session of the jury commission was held. Part of its work was to add females to the jury list, as a result of the September, 1966, amendments by the Alabama legislature extending jury service to women. The procedure for obtaining names to be added to the list, including the names of Negroes, was the same as that previously employed. There is evidence that more persons, including more Negroes, were asked for suggestions than in the past, but the system remained the same."

The District Court also found that the allegation of discrimination in the selection of Jury Commissioners failed for want of proof (A. 365).

Further, the District Court found that Alabama's jury procedures, if followed, would insure a cross-section of the community (A. 364 & 365).

ARGUMENT

I

Appellants contend that Title 30, Section 21, Code of Alabama 1940 (Recompiled 1958), as amended, is unconstitutionally vague because of its provision that jury officials of a county place on the jury roll and in the jury box the names of all citizens of the county, "** * * who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment * * **" (Appellants' Brief, p. 6).

They contend that the above quoted criteria provide such officials with the opportunity to discriminate on racial as well as other grounds in their selection of State Jurors in violation of the Fourteenth Amendment to the Constitution of the United States (Appellants' Brief pp. 12-13).

Appellants assert that the factual record in this case supports the fact that the racial exclusion found by the lower Court to have existed resulted from resort by the Jury Commissioners to the alleged vague statutory criteria (Title 30, Section 21), (Appellants' Brief, p. 11), and that the nexus between the "vague" standards and the significant racial exclusion can be demonstrated (Appellants' Brief, p. 19).

Yet, the facts are uncontroverted and are in fact attested to by Appellants' brief itself (Appellants' Brief, pp. 6 & 7), that there was virtually no resort to the criteria by the Jury Commissioners and it can hardly be demonstrated that a nexus exists between the racial exclusion and the standards which were never applied.

Appellants concede that this Honorable Court sustained a South Carolina statute containing substantially similar criteria as Title 30, Section 21, *supra*, against an attack identical to the one that they now make on the above Alabama statute in *Franklin v. South Carolina*, 218 U.S. 161, 30 S. Ct. 640, 54 L. Ed. 980; but are sure that " * * * such authority as *Franklin* may once have possessed * * * has been eroded," in light of *Louisiana v. United States*, 380 U.S. 145, 85 S. Ct. 817, 13 L. Ed. 2d. 709 (Appellants' Brief p. 17).

In that case this Honorable Court affirmed a District Court's holding that a Louisiana Constitutional amendment which required every applicant for voter registration "there-

after to 'be able to understand' as well as 'give a reasonable interpretation' of any section of the State or Federal Constitution 'when read to him by the registrar' " (380 U.S. at p. 149), was violative of the *Fourteenth Amendment*.

However, this "interpretation test" was found to be *as written, and as applied*, a part of a successful plan by the Louisiana Legislature to deprive Louisiana Negroes of their right to vote (380 U.S. at p. 151). It was found to have been used successfully to deprive otherwise qualified Negro citizens of their right to vote (380 U.S. at p. 150). The evidence showed that " * * * colored people, even some with the most advanced education and scholarship, were declared by voting registrars [administering the 'test'] with less education to have an unsatisfactory understanding of the Constitution of Louisiana or of the United States." (380 U.S. at p. 153).

Thus the *purpose* and the *effect* of the amendment was clearly shown to have been to deprive the Negro of his right to vote. (380 U.S. 150, note 9).

Such was not shown to be the case with regard to Title 30, Section 21. There was absolutely no showing by Appellants that the Alabama Legislature had racial discrimination in mind when it adopted Title 30, Section 21, as was clearly the case in *Louisiana v. U.S., supra*.

Exactly the contrary was shown by the Alabama Supreme Court's understanding of the Legislature's intent in *Fikes v. Alabama*, 263 Ala. 89, 81 So. 2d 303. There the Alabama Supreme Court stated that although the Commissioners had a very delicate task to perform which involved sound judgment and practical discretion, which was gen-

erally not revisable by the courts insofar as quashing an indictment or venire for the reason that they failed to *literally* place the name of *every* qualified person on the roll or in the jury box, "They must act in good faith and not omit a segment of people who are qualified to serve without a fair representation. *And that applies to racial difference.*" 263 Ala. at p. 95. (Emphasis added).

There was absolutely no showing that the criteria set out in Title 30, Section 21 had been applied discriminatorily, for as the factual record clearly shows, for the most part, they were not applied at all.

Thus Appellees respectfully submit to this Honorable Court that the racial discrimination found in this case resulted from the failure of the Commissioners and Clerk to familiarize themselves with the qualifications of all the potentially eligible jurors of the county, without regard to race or color as the Alabama statutes with regard to jury selection require, as was found to be the case in *Cassell v. Texas*, 339 U.S. 282, 70 S. Ct. 629, 94 L. Ed. 839. It resulted from a failure on the part of the Commissioners to consider the Negroes' qualifications at all; not the discriminatory application of the criteria set out in Title 30, Section 21, as against such qualifications.

This amounted to a breach of duty on the part of the Commissioners in violation of Title 30, Section 21 itself, in that Title 30, Section 21 requires the Commissioners to consider "*all citizens*" in the county which the record in this case plainly shows they failed to do.

Therefore, Appellees submit that were the criteria in Title 30, Section 21 to be voided as unconstitutionally vague,

the problem from which the racial exclusion resulted in this case would still remain.

II

The Jury Commission of Greene County, Alabama as presently constituted does not violate the Constitution of the United States.

The amended complaint filed in the U. S. District Court for the Northern District of Alabama by the appellants alleged that the "segregated, all white Defendant Jury Commission of Greene County, Alabama * * * is unconstitutionally constituted" and asked the District Court to "vacate the appointment of the segregated, all white Defendant Jury Commission, declaring Defendant Jury Commission vacant, and compelling Defendant Wallace to select new members without discrimination." (A 12 & 13).

Then, at the trial of the case, the counsel for appellants declined to stipulate to certain matters before the Court concerning the Jury Commission and its makeup, and indicated that he did not have the evidence he wanted and therefore did not wish this piece of evidence. (A 278-279).

Then the District Court, at the end of the trial and while instructing counsel as to briefs, had this to say:

"We have noted also three points of law that perhaps are not adequately covered in the briefs on the law filed to date.

"The first one is eliminated because of the plaintiff's statement that they cannot proceed with the theory of

a Constitutional violation by the appointment of all white jury Commissioners."

In the District Court's opinion, the following is found:

"The attack on the racial composition of the commission fails for want of proof." (A. 365)

To put this issue of the case in proper perspective, then, we have the Appellants in the District Court alleging that there had been discrimination in the selection and appointment of the Jury Commissioners; then they ask that the Jury Commission be vacated and new members selected and appointed by the Governor without discrimination, but, before the District Court can rule on their request, counsel for Appellants says he has no evidence to support such complaint and does not wish to pursue it further. Then the trial court finds as a fact that there is no evidence of discrimination in the selection and appointment of the Greene County Jury Commissioners and holds that the allegation in the complaint fails for lack of proof.

Yet when the Appellants get to this Court they still insist that the Greene County Jury Commission should be vacated and new members appointed without discrimination on the ground—not that there has been discrimination in the selection and appointment of the Commissioners by the Governor, the theory upon which this action was commenced—but that the white Commissioners have systematically excluded Negroes from the jury roll and jury box.

It is suggested to this Court that the probable reason for ignoring the allegation and prayer of the complaint that the Commission was appointed in a discriminatory fashion was that, (1) the District Court found that there was not

one single piece of evidence to support such a contention, and (2) even though Appellants have a constitutional right not to be systematically excluded from the jury roll and jury box of Greene County, Alabama, *Smith v. Texas*, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84, they have not shown that they are constitutionally entitled to be appointed to the Jury Commission itself.

Compare the case of *Clay v. U. S.*, 397 F. 2d 901, (1968), wherein the Fifth Circuit Court had this to say:

"No court has held, so far as we can determine, nor do we here, that a Negro registrant for selective service is entitled to be classified and inducted by a selective service board composed of a percentage of Negro members which the Negro population bears to the total population, or that a board lacks jurisdiction of a registrant unless so constituted. No question is raised that the boards which considered Appellant's classification were not regularly and properly constituted under appointment by the President, recommended by the governor. * * *

* * * *

"Nor is appellant's argument meritorious that composition of draft boards is similar to that of grand and petit juries. The right to trial by jury has specific constitutional authority. However, nothing in the Constitution or the Universal Military Training and Service Act requires racially proportionate selective service boards. It is not difficult to understand the reasons which support the prior rulings of the Supreme Court and this Court in the jury selection cases where convictions have been set aside for failure to have representative numbers of Negroes on jury venires. [citations] The boards are administrative agencies with specific duties, many of

them purely ministerial, which are provided for by the Act and Selective Service Regulations. * * *

The close similarity between the case at bar and *Clay v. U. S.*, *supra*, permits us to point out that Appellants have cited no authority authorizing or requiring Negroes to be represented on the Jury Commission of Greene County, Alabama.

The District Court found as a fact that:

"In practice most of the work of the Commission has been devoted to the function of securing names to be considered. Once a name has come up for consideration it usually has been added to the rolls unless that person has been convicted of a felony. The function of applying the statutory criteria has been carried out only in part, or by accepting as conclusive the judgment of others, and for some criteria not at all." (A. 358)

In other words, the District Court found from the evidence that the Commission had not been complying with the statutes of Alabama for obtaining prospective jurors.

The remedy for this omission on the part of the Commission was an order by the District Court to the Commission to " * * * take prompt action to compile a jury list for Greene County, Alabama in accordance with the laws of Alabama and the constitutional principles set out in this judgment and in the opinion of the court entered this date." (A. 372)

Such an order will assure a fair cross-section of the jury eligible population of the County being on the jury roll and in the jury box. *White v. Crook*, 251 F. Supp. 401 (M.D. Ala.

1966); and *Mitchell v. Johnson*, 250 F. Supp. 117 (M. D. Ala. 1966).

Would the relief requested of this Court by the Appellants, *i.e.* vacate the appointments to the Greene County Jury Commission and make new ones, give the relief heretofore ordered by the District Court?

It is respectfully submitted that it will not.

Suppose this Court should order the District Court to vacate the appointment and order the Governor to make new ones. Will it also say what persons are to be appointed? Will it say how many Negroes shall be on the Greene County Jury Commission? Will it be one, two or three?

In *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759, this Court held that an exact ratio of Negroes to total population is not required to be reflected on the jury roll. Would the same principle apply to the Commission itself?

The Court of Appeals for the Eighth Circuit in *Moore v. Henslee*, 276 F. 2d 876, considered a question very similar to the one presented here by the Appellants, and this is what that Court said:

"The focal point of appellants' contention, as advanced in their brief and in oral argument, is that discrimination in the selection of jury panels in Miller County, Arkansas, is necessarily practiced because the Negro race is not represented on the jury commission which is composed of three citizens. It is suggested that 'it is almost impossible' for an all-white jury commission to keep in-

formed of the habits and qualifications of the Negro population so that eligible members of that race can be selected for jury duty. We are not persuaded by this novel argument which fails to find support in either precedent or logic. Adoption of the principle contended for would require indulgence in the unwarranted presumption that jury commissioners entirely of one race will not discharge their 'duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color.' *Cassell v. State of Texas*, 339 U.S. 282, at page 289, 70 S. Ct. at page 633. Moreover we are satisfied that the theory advanced by appellants would in reality lead to complexities in the administration of an important facet of our system of trial by juries. Application of the principle contended for, could not, in our view, be limited to the white and negro races. It would encompass all races, and the numerous nationalities and religious denominations existent in this country. * * * "

The Court in *Moore v. Henslee*, *supra*, recognized the many problems involved in attempting a solution such as suggested by Appellants.

Should the Court as requested by Appellants order that Negroes be placed on the Greene County Jury Commission, would that order be satisfied by placing one Negro on the Commission? If so, the desired result would not be accomplished for he would be outvoted by the whites if they still retained their "southern racial traditions."

Would two black members on the Jury Commission assure the elimination of systematic exclusion of Negroes from the jury roll? It could, but not necessarily so. Suppose the

Governor appointed Negroes to the Jury Commission who would not place the names of Negroes on the rolls? An order similar to the one now in effect would have to be given to achieve the results desired by Appellants.

So the appointment of Negroes to the Commission would not necessarily mean that Negroes would appear in any larger numbers on the jury roll than they have in the past.

Now suppose that the two black members of the Commission put Negroes on the jury roll to the exclusion of the whites and other nationalities in the county, would not the white minority then have a complaint that they were being systematically excluded from the jury roll by a black majority of the Commission? And would not this be an unconstitutional procedure?

For how long would the Governor be enjoined to appoint two or three Negroes to the Jury Commission of Greene County, Alabama?

Would it be until the laws of Alabama and the opinion and judgment of the District Court have been complied with? If that be the period of time for the appointments, then there is no need for such an injunction for those results have been accomplished by the order of the District Court entered on September 13, 1968, requiring the elimination of systematic exclusion of Negroes from the jury roll.

However, if this be the criteria for the length of time the injunction would remain in effect; then, upon the accomplishment of this result, should it be presumed the Governor would once again be free to choose members of the Jury Commission so long as they possessed the qualifications required by Title 30, Sections 9 and 10, Code of Alabama 1940, as Recompiled 1958?

In view of all the pitfalls inherent in such a course as suggested by the Appellants, I am again very much impressed by the judgment of the Court in *Moore v. Henslee, supra*, and suggest to this Court that such an argument as presented by Appellants is not "supported in either precedent or logic."

Furthermore, would not the following directive issued to the Jury Commissions of Lowndes and Macon Counties, Alabama by the U. S. District Court for the Middle District of Alabama in the cases of *White v. Cook, supra*, and *Mitchell v. Johnson, supra*, really be the remedy the Appellants are seeking:

"Failure on the part of the defendant jury commissioners and the defendant jury commission clerk to comply immediately and in good faith with the requirements of this opinion and order will necessitate the appointment by this Court of a master or panel of masters to recompile the jury roll and to empty and refill the Lowndes County jury box. This action, if it becomes necessary, would be only for the purpose of having the requirements of the law fulfilled. * * * "

CONCLUSION

Appellees respectfully request this Court to affirm the judgment of the U. S. District Court for the Northern District of Alabama in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert P. Bradley, one of the attorneys for the Appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of May 1969 I served a copy of the foregoing Brief upon: Hon. Jack Greenberg, Hon. Norman C. Amaker, Hon. James N. Finney, 10 Columbus Circle, New York, New York 10019; Hon. Orzell Billingsley, Jr., 1630 Fourth Ave., North, Birmingham, Alabama 35203, Attorneys for Appellants, by depositing a copy in the United States mail, first class postage prepaid and properly addressed to each of them at the given address.

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IN THE

Supreme Court of the United States

October Term, 1968

No. [REDACTED] 30

WILLIE CARTER SR., JOHN HEAD, REV. PERCY McSHAN,

Appellants,

v.

JURY COMMISSION OF GREENE COUNTY, ALABAMA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

APPELLANTS' REPLY BRIEF

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JURY COMMISSION OF GREENE COUNTY, ALABAMA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

APPELLANTS' REPLY BRIEF

I

In their brief, appellees state that unlike the Louisiana Constitutional Amendment requiring the administration of an "interpretation and understanding" test as a means of disfranchising black voters in that State, the voiding of which was affirmed by this Court in *Louisiana v. United States*, 380 U.S. 145 (1965), Title 30 §21 of the Alabama Code has not been shown to have been adopted for the purpose of racial discrimination (Appellees' Brief p. 5). However, there are notable similarities dating back to the Alabama Constitutional Convention of 1901 which adopted the present Alabama Constitution, between the historical evolution of that Louisiana Constitutional provision and the jury provision in suit here, similarities which lead in-

evitably to the conclusion that the "integrity, good character and sound judgment" provision of the Alabama jury selection statute was likewise adopted as a means of barring blacks from jury service.

The 1901 Alabama Constitutional Convention like the constitutional conventions of other southern states held during that era, e.g., the Louisiana Convention of 1898 (*Louisiana v. United States, supra*), the Mississippi Convention of 1890 which adopted the Mississippi Constitution (*United States v. Mississippi*, 380 U.S. 128, 131-32 (1965)), was primarily concerned with maintaining white control and domination of the state's public affairs. Instructive are the remarks of the Convention's president, John Knox, in his opening address to the delegates:

And what is it that we do want to do? Why, it is, within the limits imposed by the Federal Constitution, to establish white supremacy in this State. *Journal of the Constitutional Convention of Alabama*, 1901, p. 9 (The Brown Printing Company, 1901)

• • •

... if we would have white supremacy, we must establish it by law—not by force or fraud. *Journal of the Constitutional Convention of Alabama*, 1901, p. 12 (The Brown Printing Company, 1901)

Establishment of white supremacy by law principally meant control of the ballot¹ but also encompassed the matter of

¹ "I submit it to the intelligent judgment of this Convention that there is no higher duty resting upon us, as citizens and as delegates, than that which requires us to embody in the fundamental law such provisions as will enable us to protect the sanctity of the ballot in every portion of the State.

The justification for whatever manipulation of the ballot that has occurred in this State has been the menace of negro domination." Opening Remarks of President Knox, *Journal of*

jury selection and service; each was seen as a necessary means of maintaining white political control in the State. Thus, during the course of the Convention's proceedings, an ordinance was proposed by one of the delegates seeking to restrict jury service in the State to whites as well as to prevent Negroes from holding public office:

Ordinance 174, by Mr. Sollie:

Be it ordained by the people of Alabama, in Convention assembled; that no person shall be eligible to hold any public office *or to serve as a juror* in Alabama who does not belong to the white race, and who is not descended exclusively from the white race, and who is not at the time of his election or appointment to such office and has not been for at least one year immediately prior thereto a citizen of the United States and of Alabama. *Journal of the Constitutional Convention of Alabama*, 1901, p. 141 (The Brown Printing Company, 1901) (Emphasis added.)

There was also a resolution introduced during the Convention to the same effect:

Resolution No. 53, by Mr. Henderson:

Resolved, that the new Constitution provide that no

the Constitutional Convention of Alabama, 1901, p. 12 (The Brown Printing Co. 1901)

President Knox then discussed the various means employed by other southern states in drafting their constitutions "to protect the sanctity of the ballot" against Negroes. What was finally agreed on by the delegates was a provision similar to that adopted by Louisiana and North Carolina requiring an applicant for voting registration to be able to "read and write any article of the Constitution of the United States in the English Language." The reason for this provision was, "that while in effect, it will exclude the great mass of ignorant Negro voters, it does not, in terms, exclude them . . ." *Journal* p. 15.

This, apparently, was the *modus operandi* subsequently used by the Alabama legislature in setting qualifications for jury service.

person of African descent shall hold office in this State, except as a teacher in the public schools of his race; *nor shall any such person be drawn to serve as a juror in the courts of this State.*

Journal of the Constitutional Convention of Alabama, 1901, p. 98 (The Brown Company, 1901) (Emphasis added.)

Though there is no record of the action taken by the Convention on either of these proposals, it is clear that the deliberations of the Convention with its stated purpose of maintaining white supremacy set the tone for the later enactment by the Alabama legislature of the law respecting jury service involved here. As one writer, in a recent publication, has stated on the basis of his research and investigation:

... Alabama's statute on the subject was deliberately vague and verbose. During the Constitutional Convention of 1901, the political leaders of Alabama had bluntly stated their goal: "to secure permanent white supremacy in this State. . . ." Out of the convention and the legislative sessions that followed came a law which limited jury service to all male citizens between the ages of twenty-one and sixty-five. Habitual drunkards, the physically disabled, and anyone "convicted of any offense involving moral turpitude" could not serve. One provision barred illiterates, but allowed their names if they were freeholders. *The most crucial section in the law closed the jury box to all men except those "generally reputed to be honest and intelligent" and "esteemed in the community for their integrity, good character and sound judgment. . . ."* Had the law been fairly enforced, there would have been few objections, but as a native Alabamian and noted Southern lawyer admitted, these vague laws were nothing

more than a mask for excluding the names of any and all Negroes.

Carter, *Scottsboro* (Louisiana State University Press, 1969) pp. 196-197 (footnotes omitted) (Emphasis supplied.)

This conclusion is inescapable in view of the State's history and the atmosphere pervading the Constitutional Convention and is entirely consistent with what the Convention had done with respect to the Constitution's voting provision (see note 1 *supra*).

II

Appellees also say in their brief that there is no nexus between racial exclusion and the vague statutory standards of Title 30 §21 because in point of fact the standards were never applied to the consideration of prospective Negro jurors in Greene County (Appellees' Brief, pp. 5, 6). However, this Court in *Whitus v. Georgia*, 385 U.S. 545, 552 (1967) condemned the "opportunity for discrimination" presented by Georgia's system of juror selection, and in our brief we pointed out that, in the absence of objective juror selection standards, jury commissioners have the opportunity to discriminate on the basis of their assumption of black racial inferiority (Brief for Appellants, p. 24). If a statute permits, as does Alabama's, the use of discretion in selecting the names of prospective jurors, then there is no difference either in motivation or in result whether the qualifications of Negroes are not considered at all³ or whether, when considered, they are excluded because in the subjective judgment of the jury selectors

³ "The Jackson County (Alabama) official finally admitted that Negroes were not excluded for any particular reason because 'negroes was never discussed.'" Carter, *op cit.*, p. 196.

they simply don't measure up to the standards required by statute. If men believe that other men are inferior, it is natural for them not to consider their qualifications because they're believed to have none. But, unmistakably, what permits these feelings to function in such a way as to achieve the result of exclusion from jury service is the absence of a statute "objectively applicable *and* objectively applied." Note, 52 Va. L. Rev. 1069, 1151. It is for this reason that the relief granted by the district court was insufficient because requiring the qualifications of Negroes to be considered is not a solution to the problem of exclusion based on racial feelings when consideration would only mean a continuation of the exclusion because of those same feelings.

The only real solution is to require resort to a source or sources of names sufficiently complete to provide a representative jury selection and to require selection from the source or sources on an objective basis. Increasingly, courts confronted with claims of racial discrimination in jury selection have directed jury selectors to the scheme adopted by Congress in the Jury Selection and Service

Act of 1968 as an appropriate means of guaranteeing both these necessary elements in the jury selection process.³

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³ See, e.g., *Love v. Gant*, CA No. 13,263 (W.D. La.)—(pending on court's suggestion that jury selection plan approved by Judicial Conference for Fifth Circuit pursuant to the Act be adopted for Bienville Parish, La.). At least one state court has also forbade the use of subjective standards in the selection of jurors (see *Wonnum v. Haygood*, CA No. 2463 (M.D. Ga.)—opinion filed August 11, 1969, p. 6 referring to action taken by Upson County, Georgia Superior Court).

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 30.—OCTOBER TERM, 1969

Willie Carter et al., Appellants,	} On Appeal from the	
v.		United States Dis-
Jury Commission of Greene		trict Court for the
County et al.		Northern District of
	Alabama.	

[January 19, 1970]

MR. JUSTICE STEWART delivered the opinion of the Court.

The appellants, Negro citizens of Greene County, Alabama, commenced this class action against officials charged with the administration of the State's jury-selection laws: the county jury commissioners and their clerk, the local circuit court judge, and the Governor of Alabama. The complaint alleged that the appellants were fully qualified to serve as jurors and desired to serve, but had never been summoned for jury service. It charged that the appellees had effected a discriminatory exclusion of Negroes from grand and petit juries in Greene County—the Governor in his selection of the county jury commission, and the commissioners and judge in their arbitrary exclusion of Negroes. The complaint sought (1) a declaration that qualified Negroes were systematically excluded from Greene County grand and petit juries, that the Alabama statutes governing jury selection were unconstitutional on their face and as applied, and that the jury commission was a deliberately segregated governmental agency; (2) a permanent injunction forbidding the systematic exclusion of Negroes from Greene County juries pursuant to the challenged

statutes and compelling all eligible Negroes to be placed on the jury roll; and (3) an order vacating the appointments of the jury commissioners and compelling the Governor to select new members without racial discrimination.

Alabama's jury-selection procedure is governed by statute. Ala. Code, Tit. 30, § 1 *et seq.* (1958 and Supp. 1967). The Governor appoints a three-member jury commission for each county. §§ 8-10. The commission employs a clerk, § 15, who is charged with the duty of obtaining the name of every citizen of the county over 21 and under 65 years of age, together with his occupation and places of residence and business. § 18. The clerk must "scan the registration lists, the lists returned to the tax assessor, any city directories, telephone directories and any and every other source of information from which he may obtain information" § 24. He must also "visit every precinct at least once a year to enable the jury commission to properly perform the duties required of it" *Ibid.*¹ Once the clerk submits his list of names, the commission is under a duty to prepare a jury roll and jury box containing the names of all qualified, nonexempt citizens in the county, §§ 20, 24, who are "generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment" § 21.²

¹ "The sole purpose of these requirements is to insure that the jury commissioners will have as complete a list as possible of names, compiled on an objective basis, from which to select qualified jurors." *Mitchell v. Johnson*, 250 F. Supp. 117, 123.

² The commission may not select any person who is under 21, an habitual drunkard, unfit to discharge a juror's duties because afflicted with a permanent disease or physical weakness, or unable to read English; nor anyone who has been convicted of an offense involving moral turpitude. A person who would be disqualified

A three-judge District Court, convened pursuant to 28 U. S. C. §§ 2281 and 2284, conducted an extensive evidentiary hearing on the appellants' complaint. The record fully supports the trial court's conclusion, set out in its detailed opinion, that the jury-selection process as it actually operated in Greene County at the outset of this litigation departed from the statutory mandate in several respects:

"The clerk does not obtain the names of all potentially eligible jurors as provided by § 18, in fact was not aware that the statute directed that this be done and knew of no way in which she could do it. The starting point each year is last year's roll. Everyone thereon is considered to be qualified and remains on the roll unless he dies or moves away (or, presumably, is convicted of a felony). New names are added to the old roll. Almost all of the work of the commission is devoted to securing names

only because he cannot read English is still eligible for jury service if he is a freeholder or householder. A person over 65 may not be required to serve but is eligible if he is willing to do so. § 21. The commission is also required to exempt various classes of persons, based on their occupation, unless they consent to serve. § 3. In addition, the court may excuse any person who appears to be unfit to serve on a jury, or who is disqualified or exempt, "or for any other reasonable or proper cause . . ." §§ 4, 5.

Until 1966 only men were eligible for service. The blanket exclusion of women was declared unconstitutional in *White v. Crook*, 251 F. Supp. 401, 408-409; thereafter Alabama amended its statutes to render women eligible. § 21 (1). The trial judge may, however, excuse them from jury duty for good cause shown. § 21.

The requirement that the commission place the name of every qualified, nonexempt person on the jury roll is permissive, not mandatory, in that the jury commission's failure to do so does not, absent fraud or denial of constitutional rights, compel the quashing of the indictment or venire. *Fikes v. State*, 263 Ala. 89, 95, 81 So. 2d 303, 309, rev'd on other grounds, 352 U. S. 191; see *Swain v. Alabama*, 380 U. S. 202, 207, n. 3; *White v. Crook*, *supra*, at 403, n. 6; *Mitchell v. Johnson*, *supra*, at 119, n. 5.

of persons suggested for consideration as new jurors. The clerk performs some duties directed toward securing such names. This is a part-time task, done without compensation, in spare time available from performance of her duties as clerk of the Circuit Court. She uses voter lists but not the tax assessor's lists. Telephone directories for some of the communities are referred to, city directories not at all since Greene County is largely rural.

"The clerk goes into each of the eleven beats or precincts annually, usually one time. Her trips out into the county for this purpose never consume a full day. At various places in the county she talks with persons she knows and secures suggested names. She is acquainted with a good many Negroes, but very few 'out in the county.' She does not know the reputation of most of the Negroes in the county. Because of her duties as clerk of the Circuit Court the names and reputations of Negroes most familiar to her are those who have been convicted of crime or have been 'in trouble.' She does not know any Negro ministers, does not seek names from any Negro or white churches or fraternal organizations. She obtains some names from the county's Negro deputy sheriff.

"The commission members also secure some names, but on a basis no more regular or formalized than the efforts of the clerk. The commissioners 'ask around,' each usually in the area of the county where he resides, and secure a few names, chiefly from white persons. Some of the names are obtained from public officials, substantially all of whom are white.

"One commissioner testified that he asked for names and that if people didn't give him names he could not submit them. He accepts pay for one day's

work each year, stating that he does not have a lot of time to put on jury commission work. . . . He takes the word of those who recommend people, checks no further and sees no need to check further, considering that he is to rely on the judgment of others. He makes no inquiry or determination whether persons suggested can read or write Neither commissioners nor clerk have any social contacts with Negroes or belong to any of the same organizations.

"Through its yearly meeting in August, 1966, the jury commission met once each year usually for one day, sometimes for two, to prepare a new roll. New names presented by clerk and commissioners, and some sent in by letter, were considered. The clerk checked them against court records of felony convictions. New names decided upon as acceptable were added to the old roll. The names of those on the old roll who had died or moved away were removed.

"At the August, 1966 meeting one commissioner was new and submitted no names, white or Negro, and merely did clerical work at the meeting. Another had been ill and able to seek names little if at all. The third could remember one Negro name that he suggested. This commissioner brought the name, or names, he proposed on a trade bill he had received, and after so using it threw it away. All lists of suggested names were destroyed. As a result of that meeting the number of Negro names on the jury roll increased by 37. . . . Approximately 32 of those names came from lists given the clerk or commissioners by others. The testimony is that at the one-day August meeting the entire voter list was scanned. It contained the names of around 2,000 Negroes.

"Thus in practice, through the August, 1966 meeting the system operated exactly in reverse from what the state statutes contemplate. It produced a small group of individually selected or recommended names for consideration. Those potentially qualified but whose names were never focused upon were given no consideration. Those who prepared the roll and administered the system were white and with limited means of contact with the Negro community. Though they recognized that the most pertinent information as to which Negroes do, and which do not, meet the statutory qualifications comes from Negroes there was no meaningful procedure by which Negro names were fed into the machinery for consideration or effectual means of communication by which the knowledge possessed by the Negro community was utilized. In practice most of the work of the commission has been devoted to the function of securing names to be considered. Once a name has come up for consideration it usually has been added to the rolls unless that person has been convicted of a felony. The function of applying the statutory criteria has been carried out only in part, or by accepting as conclusive the judgment of others, and for some criteria not at all."³

The District Court's further findings demonstrated the impact of the selection process on the racial composition of Greene County juries. According to the 1960 census, Negroes comprised three-fourths of the county's population. Yet from 1961 to 1963 the largest number of Negroes ever to appear on the jury list was about 7% of the total. The court noted that in 1964 a single-judge federal district court had entered a declaratory judgment

³ *Bokulich v. Jury Comm'n of Greene County*, 298 F. Supp. 181, 187-188. (Footnotes omitted.)

setting forth the duties of the jury commissioners and their clerk under Alabama law, instructing them not to pursue a course of conduct operating to discriminate against Negroes, forbidding them to employ numerical or proportional limitations with respect to race, and directing an examination of the jury roll for compliance with the judgment.⁴ Thereafter, the situation had improved only marginally. In 1966 only 82 Negroes appeared among the 471 citizens listed on the jury roll; 50% of the white male population of the county found its way to the jury roll in that year, but only 4% of the Negro.⁵ In 1967, following a statutory amendment, the commission added women to the jury roll. Upon the expansion of the lists, Negroes comprised 388 of the 1,198 potential jurors—still only 32% of the total, even though the 1967 population of the county was estimated to be about 65% Negro.⁶

The District Court found that "there is invalid exclusion of Negroes on a racially discriminatory basis." It enjoined the jury commissioners and their clerk from systematically excluding Negroes from the jury roll, and directed them "to take prompt action to compile a jury list . . . in accordance with the laws of Alabama and . . . constitutional principles"; to file a jury list so compiled within 60 days, showing the information required by Alabama law for each potential juror, together with his race and, if available, his age; and to submit a report

⁴ *Coleman v. Barton*, No. 63-4. The opinion is unreported. See 298 F. Supp., at 184.

⁵ In 1966 Alabama still limited jury service to males. See n. 2, *supra*.

⁶ The District Court rejected the appellees' contention that an emigration of younger and better-educated Negroes from the county in the 1960's accounted for the disparity between the racial composition of the county in 1960 and of the jury rolls during the succeeding years of the decade. 298 F. Supp., at 188. See *Coleman v. Alabama*, 389 U. S. 22, 23.

setting forth the procedure by which the commission had compiled the list and applied the statutory qualifications and exclusions.

The court declined, however, either to enjoin the enforcement of the challenged Alabama statutory provisions or to direct the Governor to appoint Negroes to the jury commission. From these rulings the appellants took a direct appeal to this Court pursuant to 28 U. S. C. § 1253. We noted probable jurisdiction. 393 U. S. 1115.⁷

I

This is the first case to reach the Court in which an attack upon alleged racial discrimination in choosing juries has been made by plaintiffs seeking affirmative relief, rather than by defendants challenging judgments of criminal conviction on the ground of systematic exclusion of Negroes from the grand juries that indicted them,⁸ the trial juries that found them guilty,⁹ or both.¹⁰ The

⁷ Other plaintiffs in the suit sought similar relief, as well as an injunction to prevent the grand jury from considering charges of grand larceny then outstanding against them. The District Court denied relief with respect to those plaintiffs, and they took a separate appeal. We affirmed that portion of the District Court's judgment last Term, and those plaintiffs are no longer before us. *Bokulich v. Jury Comm'n of Greene County*, 394 U. S. 97 (*per curiam*).

⁸ *Arnold v. North Carolina*, 376 U. S. 773 (*per curiam*); *Eubanks v. Louisiana*, 356 U. S. 584; *Reece v. Georgia*, 350 U. S. 85, 87; *Cassell v. Texas*, 339 U. S. 282; *Hill v. Texas*, 316 U. S. 400, 404, 406; *Smith v. Texas*, 311 U. S. 128, 129-130; *Pierre v. Louisiana*, 306 U. S. 354, 356-358, 362; *Rogers v. Alabama*, 192 U. S. 226, 231; *Carter v. Texas*, 177 U. S. 442, 447; *Bush v. Kentucky*, 107 U. S. 110, 121.

⁹ *Avery v. Georgia*, 345 U. S. 559; *Hollins v. Oklahoma*, 295 U. S. 394 (*per curiam*).

¹⁰ *Sims v. Georgia*, 389 U. S. 404, 407-408; *Whitus v. Georgia*, 385 U. S. 545; *Swain v. Alabama*, 380 U. S. 202; *Coleman v. Ala-*

District Court found no barrier to such a suit, and neither do we. Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion.¹¹ Surely there is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of a civil suit such as the one brought here. The federal claim is bottomed on the simple proposition that the State, acting through its agents, has refused to consider the appellants for jury service solely because of their race. Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise.¹² Once the State chooses to provide grand and petit juries, whether or not constitutionally required to do so,¹³ it must hew to federal constitutional criteria in ensuring that the selection

bama, 377 U. S. 129; *Patton v. Mississippi*, 332 U. S. 463; *Hale v. Kentucky*, 303 U. S. 613 (*per curiam*); *Norris v. Alabama*, 294 U. S. 587, 589; *Martin v. Texas*, 200 U. S. 316, 319; *Neal v. Delaware*, 103 U. S. 370, 396-397; *Strauder v. West Virginia*, 100 U. S. 303.

¹¹ *Billingsley v. Clayton*, 359 F. 2d 13, 16 (*en banc*); *Jewell v. Stebbins*, 288 F. Supp. 600, 604-605; *White v. Crook*, 251 F. Supp. 401, 405-406; *Mitchell v. Johnson*, 250 F. Supp. 117, 121. See Kuhn, *Jury Discrimination: The Next Phase*, 41 So. Cal. L. Rev. 235, 247-249; Note, *The Congress, The Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 Va. L. Rev. 1069, 1084-1094.

¹² Cf. *Carrington v. Rash*, 380 U. S. 89, 91; *Lassiter v. Northampton County Board of Elections*, 360 U. S. 45, 50-51; *Pope v. Williams*, 193 U. S. 621, 632.

¹³ Compare *Duncan v. Louisiana*, 391 U. S. 145, with *Hurtado v. California*, 110 U. S. 516.

of membership is free of racial bias.¹⁴ The exclusion of Negroes from jury service because of their race is "practically a brand upon them . . . , an assertion of their inferiority" ¹⁵ That kind of discrimination contravenes the very idea of a jury—"a body truly representative of the community," ¹⁶ composed of "the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." ¹⁷

II

On the merits, the appellants argue that the District Court erred in refusing to invalidate the Alabama statute requiring the jury commissioners to select for jury service those persons who are "generally reputed to be honest and intelligent . . . and . . . esteemed in the community for their integrity, good character and sound judgment" Ala. Code, Tit. 30, § 21 (Supp. 1967). The appellants say § 21 is unconstitutional on its face because, by leaving Alabama's jury officials at large in their selection of potential jurors, it provides them an

¹⁴ See *Ex parte Virginia*, 100 U. S. 339, 346-347; *Virginia v. Rives*, 100 U. S. 313, 321.

¹⁵ *Strauder v. West Virginia*, *supra*, at 308.

¹⁶ *Smith v. Texas*, *supra*, at 130.

¹⁷ *Strauder v. West Virginia*, *supra*. Congress, recognizing such a right, has long provided a criminal sanction for its violation:

"No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than \$5,000." 18 U. S. C. § 243.

opportunity to discriminate on the basis of race—an opportunity of which they have in fact taken advantage.¹⁸ Specifically, the charge is that § 21 leaves the commissioners free to give effect to their belief that Negroes are generally inferior to white people and so less likely to measure up to the statutory requirements;¹⁹ to the commissioners' fear that white people in the community will suffer if Negroes are accorded the opportunity to exercise the power of their majority;²⁰ and to the commissioners' preference for Negroes who tend not to assert their right to legal and social equality.²¹ The appellants say the injunctive relief granted by the District Court is inadequate, because the history of jury selection in Greene County demonstrates a practice of discrimination persisting despite the federal court's prior grant of declaratory relief. Moreover, so long as § 21 remains the law, it is argued, Negro citizens throughout Alabama will be obliged to attack the jury-selection process on a county-by-county basis, thereby imposing a heavy burden on already congested court dockets and delaying the day that Alabama will be free of discriminatory jury selection.²²

While there is force in what the appellants say, we cannot agree that § 21 is irredeemably invalid on its face. It has long been accepted that the Constitution does not forbid the States to prescribe relevant quali-

¹⁸ Cf. *Whitus v. Georgia*, *supra*, at 552.

¹⁹ Cf. *Witcher v. Peyton*, 405 F. 2d 725, 727.

²⁰ Cf. *Gray v. Main*, — F. Supp. —, —.

²¹ Cf. *Brooks v. Beto*, 366 F. 2d 1, 27 (Wisdom, J., concurring), cert. denied, 386 U. S. 975.

²² According to the appellants, civil suits challenging alleged racial discrimination in jury selection have been commenced in federal district courts throughout Alabama.

fications for their jurors.²³ The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment,²⁴ and to those possessing good intelligence, sound judgment, and fair character.²⁵ "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty."²⁶

Statutory provisions such as those found in § 21 are not peculiar to Alabama, nor to any particular region of the country. Nearly every State requires that its jurors be citizens of the United States,²⁷ residents of the locality,²⁸ of a specified minimum age,²⁹ and able to under-

²³ *Brown v. Allen*, 344 U. S. 443, 473 (opinion of Mr. Justice Reed, announcing judgment); *Cassell v. Texas*, *supra*, at 291 (Frankfurter, J., concurring in judgment); *Virginia v. Rives*, *supra*, at 334-335 (Field J., concurring in judgment); *Strauder v. West Virginia*, *supra*, at 310.

²⁴ *Neal v. Delaware*, *supra*, at 386; *Strauder v. West Virginia*, *supra*.

²⁵ *Gibson v. Mississippi*, 162 U. S. 565, 589. The federal courts have upheld similar qualifications in reviewing their own jury-selection system. See, e. g., *United States v. Flynn*, 216 F. 2d 354, 388 (C. A. 2d Cir.) (HARLAN, J.), cert. denied, 348 U. S. 909; *United States v. Dennis*, 183 F. 2d 201, 220 (C. A. 2d Cir.) (L. Hand, J.), cert. denied on this ground, 340 U. S. 863.

²⁶ *Brown v. Allen*, *supra*, at 474 (opinion of Mr. Justice Reed, announcing judgment).

²⁷ See, e. g., *Ariz. Rev. Stat. Ann.* § 21-201 (1956); *Wis. Stat. Ann.* § 255.01 (1) (Supp. 1969).

²⁸ See, e. g., *Cal. Civ. Pro. Code* § 198 (1954); *Wash. Rev. Code Ann.* § 2.36.070 (2) (1959).

²⁹ E. g., *Colo. Rev. Stat. Ann.* § 78-1-1 (1) (1963) (21 years old); *Md. Ann. Code, Art. 51, § 1* (1968 Repl. Vol.) (25 years); *Hawaii*

stand English.³⁰ Many of the States require that jurors be of "good character" or the like;³¹ some, that they be "intelligent"³² or "well informed."³³

Rev. Stat. § 609-1 (1) (1968) (20 years); Neb. Rev. Stat. § 25-1601 (1) (1964) (25 years); R. I. Gen. Laws Ann. § 9-9-1 (1956) (same).

³⁰ See, e. g., Pa. Stat. Ann., Tit. 17, § 1322 (1962). Vermont has delegated the function of determining qualifications to court administrators. Vt. Stat. Ann., Tit. 4, § 902 (Supp. 1969).

³¹ Ariz. Rev. Stat. Ann. § 21-201 (1956); Ark. Stat. Ann. § 39-206 (1962 Repl. Vol.); Conn. Gen. Stat. Rev. § 51-217 (1968); Fla. Stat. § 40.01 (3) (1961); Hawaii Rev. Stat. § 609-1 (3) (1968); Ill. Rev. Stat., c. 78, § 2 (1967) ("fair character"); Iowa Code Ann. § 607.1 (1950); Kan. Stat. Ann. § 43-102 (1964); Ky. Rev. Stat. § 29.025 (1962) ("temperate, discreet, and of good demeanor"); Me. Rev. Stat. Ann., Tit. 14, § 1254 (1964); Neb. Rev. Stat. § 25-1601 (1) (1964) ("fair character"); N. Y. Judiciary Law § 504 (4) (Supp. 1969); Okla. Stat. Ann., Tit. 38, § 28 (Supp. 1969); S. C. Code Ann. § 38-52 (Supp. 1962); Tex. Rev. Civ. Stat. Ann., Art. 2133 (2) (1964); Wis. Stat. Ann. § 255.01 (5) (Supp. 1969).

Another phrase frequently found is "approved integrity." *E. g.*, Conn. Gen. Stat. Rev. § 51-217 (1968); Fla. Stat. § 40.01 (3) (1961); Ill. Rev. Stat., c. 78, § 2 (1967); Kan. Stat. Ann. § 43-102 (1964); Me. Rev. Stat. Ann., Tit. 14, § 1254 (1964); Neb. Rev. Stat. § 25-1601 (1) (1964). See also Ariz. Rev. Stat. Ann. § 21-201 (1956) ("sober"); Md. Ann. Code, Art. 51, § 9 (Supp. 1968) ("integrity"); Miss. Code Ann. § 1762-02 (Supp. 1968) (not an "habitual drunkard"); Mo. Ann. Stat. § 494.010 (Supp. 1969) ("sober"); Okla. Stat. Ann., Tit. 38, § 28 (Supp. 1969) (not an habitual drunkard); Tenn. Code Ann. § 22-102 (1955) (same); W. Va. Code Ann. § 52-1-2 (1966) (same); cf. N. H. Rev. Stat. Ann. § 500:29 (1968 Repl. Vol.) (disqualification on account of "vicious habits"); Wash. Rev. Code Ann. § 2.36.110 (1959) ("unfit persons" must be excused).

³² Ariz. Rev. Stat. Ann. § 21-201 (1956); Cal. Civ. Pro. Code § 198 (1954); Fla. Stat. § 40.01 (3) (1961); Hawaii Rev. Stat. § 609-1 (3) (1968); Md. Ann. Code, Art. 51, § 9 (Supp. 1968); Mo. Ann. Stat. § 494.010 (Supp. 1969); Mont. Rev. Codes Ann. § 93-1301 (2) (1964 Repl. Vol.); Neb. Rev. Stat. § 25-1601 (1)

[Footnote 33 on p. 14]

Provisions of similar breadth have been challenged here and sustained before. In *Franklin v. South Carolina*,³⁴ the Court rejected a similar attack upon a jury-selection statute alleged by the plaintiff in error to have conferred arbitrary power upon the jury commissioners. The pertinent law there provided that the commissioners should "prepare a list of such qualified electors under the provisions of the constitution, between the ages of twenty-one and sixty-five years, and of good moral character, of their respective counties as they may deem otherwise well qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions, which list shall include not less than one from every three of such qualified electors" In upholding the validity of these standards, the Court said:

"We do not think there is anything in this provision of the statute having the effect to deny rights

(1964); N. Y. Judiciary Law § 596 (5) (1968) (only for cities of one million in population); Wyo. Stat. Ann. § 1-77 (2) (Supp. 1969). See also Conn. Gen. Stat. Rev. § 51-217 (1968) ("sound judgment"); Fla. Stat. § 40.01 (3) (1961) (same); Ill. Rev. Stat., c. 78, § 2 (1967); (same); Iowa Code Ann. § 607.1 (1950) (same); Me. Rev. Stat. Ann., Tit. 14, § 1254 (1964) (same); N. D. Cent. Code § 27-09-01 (1960) ("sound mind and discretion"); Okla. Stat. Ann., Tit. 38, § 28 (Supp. 1969) (same); S. C. Code Ann. § 38-52 (Supp. 1968) ("sound judgment"); Utah Code Ann. § 78-46-8 (5) (1953) ("sound mind and discretion"); Wis. Stat. Ann. § 255.01 (1957) (same).

³³ Ill. Rev. Stat., c. 78, § 2 (1967); Kan. Stat. Ann. § 43-102 (1964); Me. Rev. Stat. Ann., Tit. 14, § 1254 (1964); Neb. Rev. Stat. § 25-1601 (1) (1964); see Conn. Gen. Stat. Rev. § 51-217 (1968) ("fair education"). See Note, *The Congress, The Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 Va. L. Rev. 1069, 1072-1073 (1966) (collecting references).

³⁴ 218 U. S. 161.

secured by the Federal Constitution There is nothing in this statute which discriminates against individuals on account of race or color or previous condition, or which subjects such persons to any other or different treatment than other electors who may be qualified to serve as jurors. The statute simply provides for an exercise of judgment in attempting to secure competent jurors of proper qualifications."³⁵

Again, in *Smith v. Texas*,³⁶ we dealt with a statute leaving a wide range of choice to the commissioners.³⁷ Yet we expressly upheld the validity of the law. The statutory scheme was not in itself unfair; it was "capable of being carried out with no racial discrimination whatsoever."³⁸

No less can be said of the statutory standards attacked in the present case. Despite the overwhelming proof the appellants have adduced in support of their claim that the jury clerk and commissioners have abused the discretion that Alabama law confers on them in the preparation of the jury roll, we cannot say that § 21 is necessarily and under all circumstances invalid. The provision is devoid of any mention of race.³⁹ Its ante-

³⁵ 218 U. S., at 167-168.

³⁶ 311 U. S. 128.

³⁷ See *Akins v. Texas*, 325 U. S. 398, 402-403 and n. 3.

³⁸ 311 U. S., at 130-131. (Footnote omitted.) Compare *Hernandez v. Texas*, 347 U. S. 475, 478-479, and *Cassell v. Texas*, *supra*, at 284, where no challenge was made to the statutory scheme.

³⁹ From the earliest consideration of racial discrimination in jury selection, the Court has consistently distinguished, for purposes of determining the removability of a state criminal proceeding to a federal court, between a statute expressly excluding Negroes from jury service and one neutral on its face with respect to race but challenged as discriminatorily applied. Compare *Murray v. Lou-*

cedents are of ancient vintage,⁴⁰ and there is no suggestion that the law was originally adopted or subsequently carried forward for the purpose of fostering racial discrimination.⁴¹ The federal courts are not incompetent to fashion detailed and stringent injunctive relief that will remedy any discriminatory application of the statute at the hands of the officials empowered to administer it.⁴² In sum, we cannot conclude, even on so compelling a record as that before us, that the guarantees of the Constitution can be secured only by the total invalidation of the challenged provisions of § 21.

isiana, 163 U. S. 101, 105-106; *Smith v. Mississippi*, 162 U. S. 592, 600; *Gibson v. Mississippi*, *supra*, at 579-586; *Bush v. Kentucky*, *supra*, at 116; *Neal v. Delaware*, *supra*, at 386-393; *Virginia v. Rives*, *supra*, at 318-323, with *Strauder v. West Virginia*, *supra*, at 310-312. See *City of Greenwood v. Peacock*, 384 U. S. 808, 827-828; *Georgia v. Rachel*, 384 U. S. 780, 797-804.

⁴⁰ See Ala. Pen. Code of 1841, c. X, §§ 1, 3 (Clay's Dig. 1843).

⁴¹ Such considerations distinguish the present case from *Louisiana v. United States*, 380 U. S. 145, where we invalidated a provision of the Louisiana Constitution that vested in the State's voting registrars "a virtually uncontrolled discretion as to who should vote and who should not," and that had been abused "to deprive otherwise qualified Negro citizens of their right to vote . . ." 380 U. S., at 150. The District Court found that the constitutional provision, as written and as applied, was "part of a successful plan to deprive Louisiana Negroes of their right to vote." 380 U. S., at 151, *aff'g* 225 F. Supp. 353, 356, 363-381. Cf. *South Carolina v. Katzenbach*, 383 U. S. 301, 312-313; *United States v. Mississippi*, 380 U. S. 128, 131-136, 143-144; *United States v. Alabama*, 371 U. S. 37, *aff'g per curiam* 304 F. 2d 583, 584-589, *aff'g* 192 F. Supp. 677; *Schnell v. Davis*, 336 U. S. 933, *aff'g per curiam* 81 F. Supp. 872, 876, 878-880.

⁴² In *Louisiana v. United States*, *supra*, the District Court held the challenged constitutional provision invalid *per se* on the basis of its finding that in view of the provision's "vote abridging purpose and effect," its vices could not be cured by an injunction prohibiting its unfair application. 225 F. Supp., at 391-392, *aff'd*, 380 U. S., at 150. Cf. *Davis v. Schnell*, 81 F. Supp., at 877.

III

The appellants also attack the composition of the Greene County jury commission. They urge that the record demonstrates the causal relation between the conceded absence of Negroes from the commission for at least the past decade and the systematic racial discrimination in the selection of potential jurors established before the District Court. It is argued that even the best-intentioned white jury commissioners are unlikely to know many Negroes who satisfy the statutory qualifications; and white jury officials in Alabama generally regard Negroes as incapable of satisfying the prerequisites for jury membership. Having shown a course of continuing and consistent disregard of statutory and constitutional standards on the part of the Greene County jury commissioners and the clerk, the appellants contend that if the discretionary provisions of § 21 are to remain the law, it is essential that the jury commission be representative of the community in which it functions, particularly in an area such as Greene County, where Negroes constitute a majority of the population. The District Court erred, the appellants say, in not ordering the Governor of Alabama to appoint Negroes to the Greene County jury commission.

The claim was not presented to the District Court in precisely these terms. There the appellants did not urge that white commissioners could not perform their statutory task in an unbiased manner in a predominantly Negro county. Rather, they contended that the Governor of Alabama had deliberately appointed a segregated jury commission in exercising the discretion conferred upon him by statute. The argument, in short, went to the alleged racial discrimination in the appointment of the commission, not to the biases inherent in a commis-

sion composed entirely of white people, without regard to claimed discriminatory selection by the Governor.

For present purposes we may assume that the State may no more exclude Negroes from service on the jury commission because of their race than from the juries themselves. But the District Court found the appellants had shown only that for many years the jury commission had been composed entirely of white men, and concluded that without more the appellants' attack failed for want of proof. We think that ruling was correct. Quite apart from the problems that would be involved in a federal court's ordering the Governor of a State to exercise his discretion in a particular way, we cannot say on this record that the absence of Negroes from the Greene County jury commission amounted in itself to a *prima facie* showing of discriminatory exclusion. The testimony before the District Court indicated that the Governor had appointed no Negroes to the Greene County commission during the 12 years preceding the commencement of suit. But the appellants' trial counsel conceded that he could not prove his charge of discriminatory selection without the testimony of the Governor.⁴³ Whether or not such a concession was necessary, the statement may well have led counsel for the appellees to conclude that they were not obliged to produce witnesses on the State's behalf with respect to this phase of the appellants' case.

Nor can we uphold the appellants' present contention that apart from the question of discrimination in the composition of the jury commission, the absence of Negroes from the commission compelled the District

⁴³ The District Court granted a motion to quash the subpoena served on the Governor when it appeared that the appellants had failed to tender him his fees. See Fed. Rule Civ. Proc. 45 (c).

Court to order the appointment of Negro commissioners. The appellants are no more entitled to proportional representation by race on the jury commission than on any particular grand or petit jury."

IV

There remains the question of the propriety of the relief afforded the appellants by the District Court. The court, as we have noted, enjoined the jury clerk and commissioners from systematically excluding Negroes from the Greene County jury roll, and directed them "to take prompt action to compile a jury list . . . in accordance with the law of Alabama and . . . constitutional principles" ⁴⁵ Pursuant to the court's order, the commission submitted a new jury roll, dated November 6, 1968. The clerk stated she had been into each of the precincts of Greene County and had contacted people of both races by personal visit, letter or telephone; with their recommendations and with the help of the voting list and telephone directory, the commission compiled a new jury roll. Whether this roll complies with the terms of the District Court's decree is a matter for that court to consider in the first instance. The court properly recognized that other and further relief might be appropriate. For that court "has not merely the power but the duty to render a decree which will so far as pos-

⁴⁴ *Moore v. Henslee*, 276 F. 2d 876, 878-879; cf. *Swain v. Alabama*, *supra*, at 208; *Cassell v. Texas*, *supra*, at 291 (Frankfurter, J., concurring in judgment); *Akins v. Texas*, *supra*, at 403; *Martin v. Texas*, *supra*, at 320-321; *Gibson v. Mississippi*, *supra*, at 580; *Bush v. Kentucky*, *supra*, at 117; *Neal v. Delaware*, *supra*, at 394; *Virginia v. Rives*, *supra*, at 323; see *Hoyt v. Florida*, 368 U. S. 57, 59, 69.

⁴⁵ 298 F. Supp., at 193.

sible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.”⁴⁶

Accordingly, the judgment below is affirmed, without prejudice to the right of the appellants to seek modification of the District Court’s decree as circumstances may require.

It is so ordered.

⁴⁶ *Louisiana v. United States*, 380 U. S. 145, 154. Cf. *Alabama v. United States*, 304 F. 2d 583, 590–591, aff’d *per curiam*, 371 U. S. 37. Of particular relevance is the decree drawn by District Judge Johnson in *Mitchell v. Johnson*, in the District Court for the Middle District of Alabama, 250 F. Supp. 117, 123–124:

“The relief to be afforded in this case will involve not only the issuance of a prohibitory injunction, but an injunction requiring immediate affirmative action by the jury commissioners by their emptying the . . . County jury box, abandoning the present . . . jury roll without any further use of either, and by their recompiling a jury roll and refilling the jury box in strict accordance with the law of Alabama and the constitutional principles herein set forth In remedying this wrong, the defendants are cautioned that if they apply Alabama’s qualifications for jury service—particularly that qualification relating to good character and sound judgment and that qualification concerning the requirement that prospective jurors be able to read English—these qualification requirements must be imposed fairly and objectively and administered to all regardless of race, in a nondiscriminatory manner.

“Failure on the part of the defendants to comply immediately and in good faith with the requirements of this opinion and order will necessitate the appointment by this Court of a master or panel of masters to recompile the jury roll and to empty and refill the . . . jury box.” (Footnotes omitted.)

Accord: *Pullum v. Greene*, 396 F. 2d 251, 257; *Turner v. Spencer*, 261 F. Supp. 542, 544; *White v. Crook*, 251 F. Supp. 401, 409–410.

SUPREME COURT OF THE UNITED STATES

No. 30.—OCTOBER TERM, 1969

Willie Carter et al., Appellants, v. Jury Commission of Greene County et al.	} On Appeal from the United States Dis- trict Court for the Northern District of Alabama.
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[January 19, 1970]

MR. JUSTICE BLACK, concurring.

I concur in the judgment and opinion of the Court except insofar as it may leave an implication that this Court has the power to vacate a state governor's appointment of jury commissioners or the power to compel the governor of a State to appoint Negroes or any other persons to the office of jury commissioner. In my judgment the Constitution no more grants this Court the power to compel a governor to appoint or reject a certain individual or a member of any particular group than it grants this Court the power to compel the voters of a State to elect or defeat a particular person or a member of a particular group.



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[January 19, 1970]

MR. JUSTICE DOUGLAS, dissenting in part.

There comes a time when an organ or agency of state law has proved itself to have such a racist mission that it should not survive constitutional challenge. The instances are not numerous in our history. But they have appeared. One was present in *Louisiana v. United States*, 380 U. S. 145, where a state constitution required every voter who applied to register to "be able to understand" as well as "give a reasonable interpretation" of any section of the State or Federal Constitution "when read to him by the registrar." *Id.*, at 149. This interpretation test had had a history of depriving "otherwise qualified Negro citizens of their right to vote," *id.*, at 150, and was deemed incapable of fair application through policing by injunction. *Id.*, at 150, n. 9. We therefore struck it down.

The District Court in the instant case held that "[t]he attack on racial composition of the [jury] commission fails for want of proof. No proof was adduced except that the commission in Greene County now is and for many years has been composed entirely of white men appointed by the governor." 298 F. Supp. 181, 192. But, as the opinion of the Court states, the record shows much more: it demonstrates a systematic exclusion of Negroes from juries in Greene County even though the

Negroes outnumber the whites by two to one. It shows (1) that the white jury officials—consistent with southern racial patterns—had little, if any, contacts with Negroes; (2) that the officials knew very few Negroes and practically nothing about the black community; (3) that only a few Negroes were contacted to secure black names for jury listing; (4) that in applying the statutorily created subjective standards, the white jury officials relied not only on their own subjective judgments, but on the subjective judgments of other people; (5) that few Negroes could be expected to pass muster under these standards; and (6) that, as stated by the Court, “in 1966 only 82 Negroes appeared among the 471 citizens listed on the jury roll; 50% of the white male population of the county found its way to the jury roll in that year, but only 4% of the Negro. In 1967, following a statutory amendment, the commission added women to the jury roll. Upon the expansion of the lists, Negroes comprised 388 of the 1,198 potential jurors—still only 32% of the total, even though the 1967 population of the county was estimated to be about 65% Negro.” *Ante*, at —.

I cannot see any solution to the present problem, unless the jury commission is by law required to be bi-racial. In the Kingdom of Heaven, an all-white or an all-black commission could be expected to do equal justice to all races in the selection of people “generally reputed to be honest and intelligent” and “esteemed in the community for their integrity, good character, and sound judgment.” But, where there exists a pattern of discrimination, an all-white or all-black jury commission in these times probably means that the race in power retains authority to control the community’s official life, and that no jury will likely be selected that is a true cross-section of the community.

We have often said that no jury need represent proportionally a cross-section of the community.¹ See *Swain v. Alabama*, 380 U. S. 202, 208-209; *Cassell v. Texas*, 339 U. S. 282, 286-287. Jury selection is largely by chance; and no matter the race of the defendant, he bears the risk that no racial component, presumably favorable to him, will appear on the jury that tries him. The law only requires that the panel not be purposefully unrepresentative. See *Whitus v. Georgia*, 385 U. S. 545. Those finally chosen may have no minority representation as a result of the operation of chance, challenges for cause, and peremptory challenges.

The problem in the present case is to keep the selective process free of any racist influence. That implicates the jury commission that has continuing oversight over the operation of the jury system.

I expressed my doubts in *Sellers v. Laird*, 395 U. S. 950, whether under the Selective Service System an all-white

¹ The Civil Rights Act of 1964, 42 U. S. C. § 2000e-2 (a), 78 Stat. 255, makes it unlawful for an employer on a federally financed project "to limit, segregate, or classify" his employees because of race. In commenting on the Philadelphia Plan, regulating employment on federally financed construction jobs, the Washington Post stated:

"Quotas are understandably abhorrent to those seeking to do away with discrimination. A quota in this context means a ceiling. Some years ago, when colleges were accused of discriminating against religious minorities in their admission policies, they fixed quotas in percentage terms for these minorities based upon their ratio to the general population and not upon their ability to meet competitive entrance tests; these quotas then became a maximum for the admission of minority group students. The goals embodied in the Philadelphia Plan constitute a floor, not a ceiling, a minimum rather than a maximum; they constitute an agreement to enlarge job opportunities for minority workers, not restrict them; and so they are in complete conformity with the essential spirit and purpose of the Civil Rights Act." P. A18, January 14, 1970.

board could be expected to do equal justice to Negro registrants, at least as respects many problems. Those doubts are resolved here, because of the established pattern of racial discrimination which this all-white jury commission has credited to it. India has handled this type of problem by constitutional amendment.² But our

² The Constitution of India contains provisions for her economically and educationally deprived classes, including the untouchables. Article 15 (4) provides: "Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes." This provision was added to the Constitution by a 1951 amendment, the object of which was to override the decision in *State of Madras v. Dorairajan*, All India Rptr. 1951 Sup. Ct. 226, as to make it constitutional for the State to reserve seats for backward classes of citizens and Scheduled Castes and Tribes in public educational institutions, or to take other similar action for their advancement.

Article 16 (4), relating to public employment, provides: "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State." The objective of "adequate representation" applies not merely to lower government positions, but to all levels of government office. See *General Manager, S. Ry. v. Rangachari*, All India Rptr. 1962, Sup. Ct. 36.

Articles 330 and 332 provide for the reservation of seats for Scheduled Castes and Scheduled Tribes, except for the Scheduled Tribes in the tribal areas of Assam, in the House of the People and the legislative assembly of every State. Article 331 provides for the nomination of not more than two members of the Anglo-Indian community if the President is of the opinion that the community is not adequately represented in the House of the People. The reservation of seats mentioned above and the nomination of members of the Anglo-Indian community is to cease after 20 years, viz. January 1970. A constitutional amendment extending that time is now before the national parliament and the legislatures of the several States. See *Indian & Foreign Review* Jan. 1, 1970, p. 7.

constitutional mandate against racial discrimination is sufficient without more.

Where the challenged state agency, dealing with the rights and liberties of the citizen, has a record of racial discrimination, the corrective remedy is proportional representation. Under our Constitution that would indeed seem to be the only effective control over the type of racial discrimination long practiced in this case.

I would not write a decree that requires a governor to name two Negroes out of three commissioners. I would go no further than to strike down this jury commission system, because it does not provide for proportional representation of the two races.